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No. 87-1197

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

RONALD V. CLOUD
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether a District Court has authority under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. Sections 3663 *et seq.*, to impose $7.5 million in restitution for an insurer where Mr. Cloud and the primary victim voluntarily executed agreements fully settling all claims and the insurer, in a settlement agreement with the primary victim, expressly waived any rights to subrogation against Mr. Cloud.

B. Whether the evidence presented is sufficient to establish that Mr. Cloud knowingly entered into a criminal agreement with the intent to defraud.

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INTRODUCTORY STATEMENT

This case concerns the nature of criminal restitution orders and the effect of private contractual agreements upon the trial court's authority to issue such orders. Specifically, the issue presented is whether a district court may order a defendant to make restitution payments under the Victim and Witness Protection Act ("VWPA")[1] when the defendant and victims voluntarily executed agreements fully settling all claims that the victims might have against the defendant. The Fourth Circuit has reasoned that such contractual agreements

[1] 18 U.S.C. sections 3663 *et seq.*

divest the district court of any authority to order restitution under the VWPA. *United States v. Bruchey*, 810 F.2d 456 (4th Cir. 1987). (Attached to this petition as Appendix B). The Ninth Circuit in this case, however, held that such contractual agreements have no effect upon the district court's authority under the VWPA. There thus exists an irreconcilable difference of opinion on this issue between the Ninth Circuit and the Fourth Circuit.

Ronald V. Cloud respectfully requests that this Court grant a writ of certiorari to review the opinion of the Ninth Circuit issued on April 5, 1989. Certiorari review is both appropriate and necessary in this case for a number of reasons. First, the Ninth Circuit opinion conflicts with a prior opinion out of the Fourth Circuit. Conflicting Circuit law ill-serves the purposes of the VWPA, an enactment of national scope for which uniform application is essential. Second, the Ninth Circuit opinion obstructs the primary penal and policy objectives of the VWPA, which are to facilitate fair and prompt compensation to those who suffer damages. Unlike the reasoning of the Fourth Circuit on this issue, the Ninth Circuit's ruling encourages judicial intervention rather than settlement. Finally, *nothing in the VWPA, legislative history or case law authorizes a district court to order restitution where civil relief would, by virtue of contractual agreements, be unavailable.*

I.

OPINION BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is attached to this petition as Appendix A. No written decision was rendered by the district court for the Central District of California.

II.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on April 5, 1989. This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

This appeal does not directly implicate any provision of the United States Constitution. The issue presented is whether a district court may order restitution to an insurer under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663 *et. seq.*, where Mr. Cloud and the primary victim voluntarily executed agreements fully settling all claims, and the insurer, in a settlement agreement with the primary victim, expressly waived any rights to subrogation against Mr. Cloud. The Fourth Circuit has reasoned that such contractual agreements divest the district court of any authority to order restitution under the VWPA. The Ninth Circuit in this case, however, held that such voluntary contractual agreements have no effect upon the district court's authority under the VWPA.

IV.

REASONS FOR GRANTING THE WRIT

The writ sought by this petition should be granted to resolve a conflict between the Fourth and Ninth Circuits. The Ninth Circuit opinion in this case misconstrues material points of fact and law and directly conflicts with another opinion in this area of the law out of the Fourth Circuit. *United States v. Bruchey*, 810 F.2d 456 (4th Cir.

1987). Rules of the Supreme Court of the United States, Rule 17.1(a). Furthermore, this case involves the proper construction of a statute routinely applied in federal criminal litigation, the Victim and Witness Protection Act. Accordingly, this appeal involves a statute on which there is an overriding need for uniformity.

V.

COURSE OF PROCEEDINGS

Mr. Cloud was tried by a jury on an indictment alleging bank fraud, 18 U.S.C. § 1344 and conspiracy, 18 U.S.C. § 371. (CR 5)[2] After the government completed the presentation of its case-in-chief, Mr. Cloud moved for a judgment of acquittal on all of the charges under Rule 29(a) of the Federal Rules of Criminal Procedure. That motion was denied. Mr. Cloud moved for a judgment of acquittal again at the close of evidence. The motion was denied. On February 7, 1987, the jury returned a verdict of guilty on both counts of the indictment. (CR 9)

Mr. Cloud appealed his convictions to the Ninth Circuit Court of Appeals. The matter was submitted to the Ninth Circuit, after oral argument, on June 15, 1988. On April 5, 1989, the court issued its opinion, affirming the judgment of the district court. On May 22, 1989, Mr. Cloud filed a petition for rehearing and suggestion for rehearing *en banc* under Rules 35 and 40 of the Federal Rules of Appellate Procedure. This petition was denied by the Ninth Circuit on July 17, 1989.

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[2]"CR" refers to the Clerk's Record on Appeal.

VI.

STANDARDS OF REVIEW

The restitution order in this case is subject to *de novo* review because it raises a question of statutory interpretation. *United States v. Youpee,* 836 F.2d 1181, 1182 (9th Cir. 1988).

On a challenge to the sufficiency of the evidence, the standard of review is whether there is substantial evidence to support the conviction. *United States v. Nolan,* 700 F.2d 479, 485, (9th Cir.), *cert. denied,* 462 U.S. 1123 (1983). The reviewing court must determine whether, viewing the evidence in a light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt of each essential element of the crime charged. *United States v. Universal Trade Industries, Inc.,* 695 F.2d 1151, 1153, (9th Cir. 1983).

VII.

STATEMENT OF FACTS

A. THE TRIAL.

This action concerns the sale of the Cal Neva Lodge, a hotel, restaurant and casino located in the Lake Tahoe area on the border of California and Nevada. Beginning in 1983, Mr. Cloud sought buyers for the Lodge and was finally approached by Mr. Jon Perroton. [RT 4/740-744][3] The two men agreed upon a sale price of $17,030,000. [RT 4/7-9]

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[3]"RT" refers to the Reporter's Transcript of Proceedings. The first number refers to volume, the second number refers to pages.

Without Mr. Cloud's knowledge, Mr. Perroton met with Hibernia Bank officials in early January, 1985. At that time he falsely represented to the Bank that Sheraton Hotels would lease and operate the Cal Neva Lodge and would guarantee any loan Hibernia would provide for the acquisition. Mr. Perroton presented forged documents reflecting a sales agreement with Mr. Cloud at a purchase price of $27.5 million, rather than the $17,030,000 price actually agreed upon by Mr. Cloud. These documents also falsely reflected a $7.5 million deposit to Mr. Cloud outside of escrow. [RT 2/189-209] Mr. Cloud never saw any of these documents. [RT 4/26-28] Indeed, the government did not contend at trial that Mr. Cloud was in any way responsible for those documents.[4]

On January 14, 1985, Hibernia Bank issued $20 million in cashier's checks to escrow, accompanied by detailed escrow instructions, without ever speaking to, or receiving documents from, Mr. Cloud. [RT 2/227-297] The escrow instructions required *no* affirmative acts on Mr. Cloud's part except that he transfer a grant deed to Mr. Perroton. Based solely upon information provided by Mr. Perroton and Hibernia Bank, the escrow company prepared documents showing that the sales price was $27.5 million and that Mr. Cloud had received $7.5 million outside of escrow. [RT 2/387-389, 433-437, 459-467] As of that date, Mr. Cloud had met with Mr. Perroton personally only once to negotiate a sales price of $17,030,000. Mr. Cloud had not been told the identity of the bank from which Mr. Perroton secured funds. [RT 4/7-9]

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[4]Mr. Perroton was indicted separately for bank fraud in connection with the Cal Neva Lodge transaction. He was convicted on a plea of guilty and later sentenced to 20 years imprisonment. Restitution in the amount of $10 million was also imposed against Mr. Perroton. [CR 152]

On January 15, 1985, Mr. Cloud, along with his son and his attorney, met in San Francisco with Mr. Perroton, Mr. Perroton's partner and officials from the escrow company. No Hibernia Bank officials were present. [RT 3/614-619, 4/759-761, 12-13] At this meeting, for the first time, Mr. Cloud and his attorney reviewed the escrow documents. What occurred thereafter was hotly disputed at trial. Defense testimony revealed that upon reading the escrow documents, Mr. Cloud and his attorney noticed that the sales price and the reference to a deposit outside of escrow were incorrect. Mr. Cloud objected to these discrepancies but was assured by Mr. Perroton that these figures were "for the buyer's purposes only," and were not relevant insofar as Mr. Cloud was concerned. Mr. Cloud, on the advice of his attorney, acquiesced to the form of the documents. [RT 3/618-627, 4/761-766, 14-17] In order to clarify the substance of the transaction, however, Mr. Cloud and his attorney insisted that the escrow instructions be amended to state that Mr. Cloud was to "net the sum of $17,030,000," the actual selling price for the Lodge. [RT 2/399-405, 3/437-454, 625-627, 4/18-21] Mickey Eakin, the escrow officer in charge of the transaction from the Transamerica Title Company testified for the prosecution. She stated that at the January 15 meeting, Mr. Cloud met with Mr. Perroton and others outside of her presence. Ms. Eakin denied hearing any objection by Mr. Cloud regarding the figures on the escrow documents. She testified that despite the amendments to the escrow instructions, she believed that the actual sales price was $27.5 million, not $17,030,000.

In closing argument the Government contended that although Mr. Perroton instigated the fraud, Mr. Cloud joined the conspiracy at the January 15 meeting in San Francisco. The defense argued that Mr. Cloud was victimized by Mr. Perroton just like the bank loan officers,

escrow personnel and the attorneys who supervised the transaction. Mr. Cloud behaved like any other innocent reasonable seller of property who executed escrow instructions on the express advice of counsel. The jury convicted Mr. Cloud for bank fraud and conspiracy to commit bank fraud.

B. THE SETTLEMENT AGREEMENTS RESOLVING ALL CLAIMS AGAINST MR. CLOUD AND THE RESTITUTION ORDER.

After Hibernia Bank discovered that it had sustained a loss in connection with the $20 million loan it provided to Mr. Perroton and his company, Hibernia filed a claim of loss in the amount of $20 million against its insurer, Continental Insurance Company ("Continental"). Continental and Hibernia settled Hibernia's claim pursuant to a compromise whereby Continental agreed to pay Hibernia $7.5 million. Continental further agreed to waive all subrogation rights or causes of action it may have had against any party connected with Hibernia's claim of loss, including Mr. Cloud. In turn, Hibernia agreed that it would not pursue its claim of loss for $20 million against Continental. Hibernia also reserved its right to pursue any claims it may have had in connection with the Cal Neva Lodge transaction. [CR 80, 83, 92] Mr. Cloud and Hibernia subsequently entered into an agreement whereby $1.5 million was paid to Hibernia by Mr. Cloud to resolve all potential claims against him. In spite of these agreements, the district court imposed restitution against Mr. Cloud in the amount of $7.5 million payable to Continental.[5]

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[5]More specifically, the district court imposed restitution pursuant to 18 U.S.C. § 3579(e)(1). That provision provides that the court "... shall not impose restitution with respect to a loss for which the victim

C. THE NINTH CIRCUIT OPINION.

Essentially, the Ninth Circuit concluded that although Mr. Cloud did not originally participate in Mr. Perroton's fraud, a rational jury could reasonably infer that Mr. Cloud later "came aboard" when he noticed that certain terms in the escrow instructions were not accurate. *United States v. Cloud,* 872 F.2d 846, 850-853 (9th Cir. 1989). With respect to the restitution order, the court concluded that because Continental had no independently enforceable "right" to restitution under the VWPA, its waiver of the right to obtain compensation from Mr. Cloud had no effect on the district court's authority under the VWPA. In so ruling, the Ninth Circuit relied primarily on this Court's reasoning in *Kelly v. Robinson,* 479 U.S. 36, 107 S.Ct. 353 (1986). *Cloud,* 872 F.2d at 854.

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has received . . . compensation." That subsection also provides in pertinent part that the court may " . . . order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. . . . " This provision has been constructed to authorize restitution to an insurance company in a case where there were no voluntarily executed settlement agreements between the defendant and any alleged victims resolving all claims of liability. *United States v. Durham,* 755 F.2d 511 (6th Cir. 1985).

VIII.

ARGUMENT

A. THE $7.5 MILLION RESTITUTION ORDER IS PATENTLY ILLEGAL BY VIRTUE OF THE SETTLEMENT AGREEMENTS AMONG THE PARTIES WHICH RENDER THE VWPA INAPPLICABLE.

1. The Statute.

The statute conferring authority upon district courts to impose restitution is designed to provide a remedy to victims of crime who otherwise would be forced to pursue civil claims against the defendant or forego compensation altogether. *United States v. Spinney,* 795 F.2d 1410 (9th Cir. 1986). The provisions of the VWPA attempt to provide symmetry between a defendant's obligation to make restitution and a victim's option to pursue civil remedies against the defendant.[6] The VWPA provides a victim of criminal conduct two means to obtain compensation available under civil compensatory law. The victim can bring a civil action for damages or collect compensation pursuant to a penal restitution order under the VWPA. *Because of this symmetry between penal sanctions under the VWPA and a victim's rights under civil law, contractual agreements bearing upon a defendant's liability*

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[6]For instance, § 3579(e)(1) prohibits restitution to the extent the victim has received or is to receive compensation. Section 3579(e)(2) provides that the amount of restitution shall be set off against amounts recovered by the victim in any state or federal civil proceeding. Section 3579(1) authorizes the enforcement of a restitution order by way of a civil action. Finally, § 3580(e) precludes a convicted defendant from denying the essential allegations of the offense in a subsequent civil proceeding brought by the victim to obtain compensation.

are germane to a court's authority to impose restitution under the VWPA. Nothing in the Act, legislative history or case law authorizes a district court to order, as restitution, compensation not otherwise available as a matter of civil compensatory law.

2. The Ninth Circuit's Reliance On *Kelly v. Robinson* Is Misplaced. *Kelly* Does Not Address The Effect Of Contractual Agreements Upon The District Court's Authorization To Order Restitution Under The VWPA.

The Ninth Circuit's opinion that the settlement agreements between the parties could not operate to divest the district court of authority to order restitution is flawed for a number of reasons, not the least of which is its reliance upon *Kelly v. Robinson,* 479 U.S. 36, 107 S.Ct. 353 (1986). At issue in *Kelly* was whether Section 523 of Chapter 7 of the Bankruptcy Code (11 U.S.C.) allowed discharge of a state criminal judgment taking the form of restitution. *Id.* at 51. In considering this question, the Court cited several concerns unique to federal bankruptcy proceedings for its conclusion that Section "523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence."[7] *Id.* at 50.

In *Kelly,* this Court explained that the purpose of criminal restitution is to achieve penal objectives such as deterrence and retribution, and should not be ordered because a victim may have a legal entitlement. The Ninth

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[7]"In light of the strong interests of the States (in the integrity of their penal systems), the uniform construction of the old Act over three-quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, we believe this result best effectuates the will of Congress." *Kelly,* 479 U.S. at 53.

Circuit expressly relied upon the following statement by the Court to support the conclusion that an order under the VWPA creates no debt or right susceptible to waiver.

> Although restitution does resemble a judgment for the benefit of the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. *Cloud,* 872 F.2d at 854 (quoting *Kelly,* 479 U.S. at 52.)

The foregoing dicta from *Kelly* is not applicable to the provisions and policy objectives of the VWPA and is mistakenly relied upon by the Ninth Circuit. Under the terms of the VWPA, a criminal restitution order is akin to a judgment, and made for the benefit of the victim.[8] This judgment therefore may be enforced by the victim, and is in fact an enforceable debt which may be waived by the victim.[9] Additionally, unlike *Kelly,* the VWPA provides for victim input on whether to award restitution as well as the amount. In this case, Continental participated in the

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[8]"[a]n order of restitution may be enforced . . . by the victim named . . . in the same manner as a judgment in a civil action." 18 U.S.C. § 3663(h).

[9]The Third Circuit in *In Re Johnson-Allen,* 871 F.2d 421 (3rd Cir. 1989), supported this reasoning by holding that a criminal restitution order is a "debt" within the meaning of the Bankruptcy Code, and dischargeable under Chapter 13. *Id.* at 426 (*In Re Johnson-Allen* is attached to this petition as Appendix C.) The dissent in *Johnson-Allen,* citing the "strong dicta" in *Kelly* disagreed with the majority's conclusion. *Johnson-Allen,* 871 F.2d at 429. By granting a writ of certiorari in this case, the Court could also take this opportunity to resolve the matter of whether criminal restitution orders are debts.

sentencing phase of the case and the judge incorporated the extent of the injury into the restitution formula.

The narrow holding in *Kelly* does not nearly support the Ninth Circuit's broad conclusions. *Kelly* was concerned *solely* with the statutory requirements for discharge under Section 523(a)(7) of the Bankruptcy Code; it had *nothing* to say concerning the effect of contractual agreements upon the district court's authorization to order restitution under the VWPA. Similarly, *Kelly* does not discuss how parties may enforce restitution orders, what parties are entitled to receive the restitution, or whether a party may waive its right to receive restitution. Indeed, *Kelly* has no bearing at all on the construction of the VWPA except that the "sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State. Those interests are *sufficient* to place restitution orders within the meaning of [section] 523(a)(7)." *Kelly,* 479 U.S. at 53 (footnote omitted, emphasis added).

The Ninth Circuit's reliance upon *Kelly* is also erroneous because the underlying concerns prompting this Court's ruling in that case are completely inapplicable here. For example, no criminal sentence here will be discharged or effectively nullified by limiting the authority of the district court to order restitution in the face of settlement agreements between the parties. Thus, *Kelly*'s federalism concerns are of no moment here. Furthermore, there is no concern that any long-standing law or policy will be invalidated or placed in doubt. Indeed, the only prior reported decision on this issue, *Bruchey, supports* the rule advocated herein. Simply put, *Kelly* does not support the Ninth Circuit's conclusions that victims have no "right" to restitution under the VWPA, that a victim may not waive its right to restitution, or that contractual

agreements have no effect upon the authority of a district court to order restitution. Certiorari review is necessary to preclude misconstruction of this Court's precedent.

3. Review By The Court Is Essential To Resolve The Split Of Authority On This Issue.

The propriety of a penal restitution order following the voluntary execution of a civil contract settling all claims between the defendant and any alleged victims was addressed in *Bruchey*. The defendant in that case was convicted for embezzling $50,000 from a bank. The district court imposed a sentence which included an order of restitution. Ultimately, the district court compelled the defendant to sign a promissory note requiring her to make payments beyond the five-year period authorized for such installments under the VWPA.

On appeal, the Court of Appeals held, among other things, that the restitution order was improper. In vacating the order, the court stated:

> More troubling and difficult, however, are the issues raised by the unusual character of the modified restitution order at issue here .... The final order's fusion of civil compensatory and criminal restitutionary law may have occurred more accidentally than deliberately .... Whatever the genesis of the order, we believe that the final order is not contemplated in its present form by the VWPA, and that it creates difficult and unnecessary problems. The victim and defendant never "agreed" on the terms of a promissory note and we conclude that the court should not compel a defendant to sign such an "agreement". Should the victim and defendant reach and offer to the district court a truly voluntary restitution agree-

> ment, it should be treated differently than it was treated here ....
>
> Our expressions of concern regarding the duration and form of the restitutionary order should not be taken to mean that a promissory note or the like should never be countenanced as "restitution". Where the victim and defendant *voluntarily* execute such a note, the judge may certainly factor that agreement into his sentencing decision. We must observe, however, that such a voluntarily executed agreement constitutes *full and immediate restitution* — fully settling the victim's claim against the defendant. The district court, once it found that the agreement had been reached, would have no further role to play under the VWPA. The victim could simply enforce the civil obligation through the ordinary civil process.
>
> A simple rule that district courts separate as best they can the "penal" elements of criminal restitution by court order from the purely "civil" elements of a private compensation agreement would work no hardship on victims while avoiding some of the problems in the as yet uncharted waters of criminal restitution law .... *Id.* at 459-61.

The Ninth Circuit acknowledged that Mr. Cloud and Continental were both voluntary parties to a full and complete settlement of all of Continental's claims. *Cloud,* 872 F.2d at 850. The Ninth Circuit explicitly rejected the Fourth Circuit in *Bruchey,* however, stating that:

> We believe that these statements [of the *Bruchey* court] which clearly constitute dicta are ill advised .... We therefore conclude that, despite the existence of settlement agreements among the parties,

> the district court was authorized by the VWPA to order Cloud to pay restitution to the insurance company in this case.
>
> *Cloud,* 872 F.2d at 854 (footnote omitted)

Instead of awaiting an enforceable, court-imposed restitution order under VWPA, both Continental and Hibernia Bank pursued their respective civil remedies against Mr. Cloud. In the case of Continental, it chose to waive those remedies. In the case of Hibernia, it and Mr. Cloud entered into a settlement agreement constituting, under *Bruchey,* full restitution.

The split of authority on this question between the Ninth Circuit opinion in *Cloud* and the Fourth Circuit's opinion in *Bruchey* is irreconcilable. Because the VWPA is a statute routinely supplied in federal criminal cases, review by this Court is essential to maintain uniform application of law.

4. Because The Victim Is Statutorily Authorized To Enforce Its Right To Receive Restitution Under The VWPA, It Must Necessarily Have The Ability To Waive That Recovery.

Contrary to the Ninth Circuit's underlying premise, the victim of a crime is statutorily authorized to enforce its right to receive restitution under the VWPA. Section 3663(h) of Title 18 provides, in relevant part, that: "[a]n order of restitution may be enforced . . . by the victim named in the order to receive the restitution in the same manner as a judgment in a civil action."

Because Continental may enforce its recovery under the VWPA, it must necessarily have the ability to waive that recovery. Such a waiver must, in turn, divest the district court of any authority to make a restitutionary award.

Any other conclusion would present illogical and inequitable results certainly not contemplated by the VWPA.[10]

This reasoning was adopted by the Third Circuit in *In Re Johnson-Allen,* wherein the court decided that a criminal restitution order was a "debt" within the meaning of Chapter 13 of the Bankruptcy Code and that such a debt is dischargeable. In so holding, the court made specific reference to *Kelly,* reasoning therefrom that "if restitution orders and other criminal penalties were not debts, there would be no need to except them from discharge under Chapter 7," as did the Court in *Kelly. Johnson-Allen,* 871 F.2d at 426. This holding cannot be reconciled with the Ninth Circuit's conclusions. Because *restitution orders constitute enforceable debts, as the Third Circuit held, then it is certainly within the creditor's power to excuse or otherwise "waive" those debts. In this case, the insurer, Continental, did just that.*

5. The Ninth Circuit Opinion Creates Bad Policy By Encouraging Litigation In An Area That Can And Should Be Privately Handled.

The Ninth Circuit's statutory interpretation of the VWPA violates the axiom that laws should receive sensible construction to avoid unjust or absurd consequences. *Government of the Virgin Islands v. Berry,* 604 F.2d 221, 225 (3rd Cir. 1979). The rule enunciated by the Ninth Circuit is unsound because it tends to *encourage* litigation by forcing court involvement in an area — namely compensation for loss — that can and should be privately handled. Conversely, a rule that divests the district court

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[10]For example, under the rule announced by the Ninth Circuit, even though Continental unreservedly waived any right to recover from Mr. Cloud, it could nonetheless proceed in an independent civil action to enforce its *abandoned* claim.

of authority to order restitution where the parties *voluntarily* settle their claims would have the salutary effect of lessening court involvement. *See also,* Footnote 7, *supra,* and accompanying text.

Encouraging private settlement undoubtedly best serves the parties and fully satisfies all purposes, whether penal or otherwise, of the VWPA. Voluntary settlement between the parties furthers the victim's interest in obtaining prompt compensation and encourages a voluntary, rather than court-imposed, obligation on the defendant to provide restitution. Settlements promote judicial economy by rendering participation by the court unnecessary insofar as compensation to any victim is concerned. Settlements also promote the rehabilitative objectives of the VWPA by causing the defendant to voluntarily accept responsibility for his or her acts.

The Ninth Circuit's ruling forces district courts to become involved where the parties have privately resolved their claims. *This is not a case where a court should undo a settlement on policy grounds because of inequitable bargaining positions among the parties.* Here, Continental, a large insurance company undoubtedly represented by adequate legal counsel, voluntarily settled its claims. There is no plausible reason for society, through the courts, to adopt a paternalistic attitude toward parties who have satisfactorily resolved their differences.

6. Ordering Restitution In The Criminal Action Despite Contractual Settlements Renders The Civil Waiver Contract Illusory.

To allow an insurance company, which previously waived its rights against any party in relation to a matter, to recover restitution would effectively render the civil

waiver contract illusory. Insurance companies can then avoid potential bad faith claims by their insureds simply by entering into these illusory civil contracts for waiver of rights, knowing that it can recover through restitution in the criminal action. It would be inherently unfair to bind Mr. Cloud to an arbitrary number agreed upon by Hibernia Bank and Continental Insurance Company in settlement of their claims. Mr. Cloud did not participate in or consent to that settlement. Had the Bank and the insurer agreed to a $15 million settlement, would Mr. Cloud be bound to make restitution in the higher amount? In order to bind the insurance company to its promise in the contract, the Court should construe the contract as barring a claim for restitution in the criminal action. In light of the contractual agreements among the parties, Continental Insurance Company should not be considered a "victim" under the Victim and Witness Protection Act. *Bruchey,* 810 F.2d at 461.

B. THE EVIDENCE WAS NOT SUFFICIENT TO ESTABLISH THAT MR. CLOUD KNOWINGLY ENTERED INTO A CRIMINAL AGREEMENT WITH THE INTENT TO DEFRAUD.

The imposition of criminal liability rarely extends to an individual who has literally no part in the conduct giving rise to a violation of the law. That is exactly what has happened, however, to Mr. Cloud. Mr. Cloud stands erroneously convicted of fraud and conspiracy for receiving funds obtained through misconduct committed exclusively by Jon R. Perroton in the course of a transaction closely monitored by Hibernia Bank, the law firm of Brobeck, Phleger & Harrison and Transamerica Title Company.

Essentially, the elements of conspiracy are an agreement between two or more people to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the objective and the requisite intent to commit the underlying substantive offense. The agreement may be inferred from circumstantial evidence, and inferences of the existence of such an agreement may be drawn if there is concert of action, with all of the parties working together knowingly, with a single design for the accomplishment of a common purpose. Once a conspiracy is established, slight evidence may be sufficient to connect the defendant with it. *United States v. Kiriki,* 756 F.2d 1449 (9th Cir. 1985).

Mere involvement in an unsavory scheme is not sufficient to establish knowing participation for fraud. It is necessary to show willful participation in a scheme with knowledge of its fraudulent nature and with intent that illicit objectives be achieved. Participation in furtherance of a fraudulent scheme does not, by itself, justify a conviction unless the defendant's knowledge of the fraudulent purpose can be shown. *United States v. Price,* 623 F.2d 587 (9th Cir.), *cert. denied,* 449 U.S. 1016 (1980).

The evidence presented was insufficient to support the conclusion that Mr. Cloud became a willful, knowing participant in Mr. Perroton's scheme to defraud Hibernia Bank. Prior to the issuance of the $20 million in checks by the Bank on January 14, 1985, Mr. Cloud dealt with Mr. Perroton just once over the phone and once in person. The government presented no direct evidence that Mr. Cloud knew a crime was being committed. Neither Mr. Perroton nor any other witness testified that Mr. Cloud was told

they were engaging in a scheme to defraud the Bank.[11] Before Mr. Cloud arrived at the title company on January 15, he had not seen or discussed escrow instructions. He had never met, corresponded with or spoken with anyone from the Bank and did not know how Mr. Perroton intended to finance the purchase. The only evidence of discussions regarding the escrow instructions was that Mr. Cloud was told by Mr. Perroton and his partner that the price and escrow figures were "for the buyer's purposes only". After being shown $20 million in cashier's checks submitted by the Bank to the title company, Mr. Cloud had no reason to know whether Hibernia Bank intended to rely upon or even review the instructions. The Bank had no representative present at the closing, had made no effort to contact Mr. Cloud and, as far as Mr. Cloud knew, had never attempted to appraise the Lodge.

Mr. Cloud's execution of the escrow instructions is not sufficient to establish knowledge or participation in any scheme or conspiracy to defraud. The instructions, as amended by counsel for Mr. Cloud, were at worst ambiguous. More specifically, Mr. Cloud refused to sign the original instructions presented by Mr. Perroton at the title company. Mr. Cloud's attorney insisted upon adding language to the instructions stating the true nature of the transaction as it pertained to Mr. Cloud. Moreover, Mr. Cloud and his counsel placed additional conditions on the escrow, including a demand for a good faith deposit and a later refusal to pay relatively nominal interest charges

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[11] The fact that Mr. Cloud spent some time with Mr. Perroton and his partner in a car on the way to the title company from the airport does not alone support any inference that any fraudulent scheme or conspiracy was discussed. *See United States v. Penagos*, 823 F.2d 346 (9th Cir. 1987); *United States v. Cloughessy*, 572 F.2d 190 (9th Cir. 1977).

resulting therefrom. These acts are inconsistent with willful participation by Mr. Cloud in a scheme to defraud. Mr. Cloud's presence at the January 15 meeting and the fact that he signed the escrow instructions and accepted the settlement agreement are insufficient evidence from which to infer knowledge of, or intent to assist Mr. Perroton in any scheme to defraud Hibernia Bank.

Mr. Cloud behaved in this matter like any other innocent seller of a valuable piece of property. All of the respective parties involved in the Cal Neva Lodge transaction were led astray by the conduct of Mr. Perroton. The loan officials of the Bank were misled. The escrow officer of Transamerica Title Company was misled. Even Hibernia Bank's lawyers, the law firm of Brobeck, Phleger & Harrison, were lulled into carelessness by the grandiose misrepresentations made exclusively by Mr. Perroton. Brobeck, Phleger & Harrison paid $2.6 million to Hibernia Bank as a result of a lawsuit filed by the Bank in connection with the facts of this case. [RT 2/360][12] Negligence on the part of Hibernia Bank, its lawyers, and Transamerica Title Company contributed more to the

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[12] *To date, Hibernia Bank has collected approximately $23.8 million from parties connected with the $20 million issued by the Bank in this case.* The Bank acquired the Lodge and sold it for $10 million. It retrieved $2.2 million from Mr. Perroton. The Bank received $2.6 million from its lawyers, Brobeck, Phleger & Harrison. $7.5 million was paid to the Bank by Continental Insurance Company. Finally, Mr. Cloud paid the Bank $1.5 million pursuant to their settlement agreement. Moreover, Hibernia Bank threatened a lawsuit against Transamerica Title Company for its role in this matter. The title company agreed, however, to extend the applicable statute of limitations pending the outcome of the prosecution against Mr. Cloud. [RT. 2/354-356, 360] The total loss claimed by the Bank for costs connected to the Cal Neva Lodge transaction is $24.5 million. [RT. 2/372]

fraudulent venture of Mr. Perroton than anything done by Mr. Cloud.

Mr. Cloud is simply another one of the numerous parties victimized by the conduct of Mr. Perroton. The evidence presented at trial does not support any inference that Mr. Cloud and Mr. Perroton acted in concert pursuant to a criminal agreement. That evidence indicates, instead, that *Mr. Cloud was in the same position vis-a-vis Mr. Perroton as Hibernia Bank, Brobeck, Phleger & Harrison and Transamerica Title Company.* It is nothing short of outrageous to claim that Mr. Cloud is criminally responsible for what occurred during the Cal Neva Lodge transaction in light of the greater, more direct roles played in that entire process by the Bank itself, its lawyers and the title company. Mr. Cloud's conduct was consistent with that of an innocent person without any stake in the fraud perpetrated by Mr. Perroton. The evidence falls far short of establishing, beyond reasonable doubt, that Mr. Cloud agreed with criminal intent to participate in Mr. Perroton's scheme to defraud. Therefore, the convictions should be reversed. *See e.g., United States v. Price,* 623 F.2d 587 (9th Cir.), *cert. denied,* 449 U.S. 1016 (1980); *United States v. McDonald,* 576 F.2d 1350 (9th Cir.), *cert. denied,* 439 U.S. 830 (1978).

IX.

CONCLUSION

Petitioner Ronald V. Cloud respectfully urges this Court to grant review of this case to settle an irreconcilable split of authority among the Circuits. The Ninth Circuit and the Fourth Circuit currently disagree on whether a district court may order a defendant to make restitution payments under the VWPA when the defendant and victim have executed agreements fully settling

all their claims. Because all penal and other policy considerations of the VWPA were met by the voluntarily executed agreements between Mr. Cloud, Continental, and Hibernia Bank, the district court was without authorization to order additional restitution under the VWPA and its order should be reversed. Additionally, the evidence supporting the allegation Mr. Cloud knowingly entered into a criminal agreement with the intent to defraud is insufficient. Review by this Court is appropriate and necessary on this issue as well.

DATED: September 14, 1989

Respectfully submitted,

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By _____
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RONALD V. CLOUD

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD V. CLOUD,
Defendant-Appellant.

No. 87-1197.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 15, 1988.
Decided April 5, 1989.

Defendant was convicted, in the United States District Court for the Northern District of California, Samuel Conti, J., of bank fraud and conspiracy to commit bank fraud, and ordered to pay restitution to victim's insurer, and he appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that: (1) convictions were supported by sufficient evidence, and (2) defendant was properly ordered to pay restitution to victim's insurer.

Affirmed.

1. Banks and Banking — 509.10

In order to obtain conviction for bank fraud, it was sufficient for Government to prove that there was a fraudulent scheme in which defendant participated; it was not determinative that defendant was not on hand at the "launching" of the scheme if he "came aboard" later. 18 U.S.C.A. § 1344.

2. Banks and Banking — 509.25

Defendant's conviction for bank fraud was supported by sufficient evidence showing that defendant signed

mutual escrow instructions knowing that they contained materially false representations as to sale price and down payment figures. 18 U.S.C.A. § 1344.

3. Banks and Banking — 509.10

Mere fact that defendant's attorney, at escrow meeting, changed escrow instructions did not relieve defendant from liability for bank fraud based upon false representations in escrow instructions, inasmuch as attorneys' changes did not alter the false sales price and down payment figures. 18 U.S.C.A. § 1344.

4. Banks and Banking — 509.10, 509.25

In prosecution for bank fraud, Government was not required to prove that defendant made misrepresentations with intent to deceive bank, or that bank relied on defendant's misrepresentations, but rather defendant's fraudulent intent could be established by circumstantial evidence and inferences drawn from all the evidence. 18 U.S.C.A. § 1344.

5. Conspiracy — 47(4)

Defendant's conviction for conspiracy to commit bank fraud was supported by sufficient evidence showing that defendant and third party agreed to engage in bank fraud scheme in connection with sale of a lodge, and that defendant signed mutual escrow instructions containing materially false representations. 18 U.S.C.A. § 1344.

6. Criminal Law — 1028

Defendant's failure to raise at trial issue of whether he was a third-party beneficiary of agreement by which bank fraud victim's insurer waived its subrogation and direct rights to sue any party in connection with the fraudulent transaction precluded appellate review.

7. Criminal Law — 1208.4(2)

Neither bank fraud victim nor its insurer had a preexisting "right" to receive restitution under Victim and Witness Protection Act, but rather restitution was ordered as a means of achieving state's penal objectives. 18 U.S.C.A. §§ 3663, 3663(e)(1), 3664.

8. Criminal Law — 1208.4(2)

District court had authority to order defendant to pay restitution to bank fraud victim's insurer despite fact that defendant and victim had entered into settlement agreement to which insurer was a party, inasmuch as insurer had no right to restitution that it could have waived. 18 U.S.C.A. § 3663(e)(1).

9. Criminal Law — 1208.4(2)

District court was not required to make clear findings of fact before entering an order of restitution under the Victim and Witness Protection Act, but rather court was required only to consider amount of loss sustained by victim, financial resources and earning power of defendant, financial needs of defendant and her dependents, and other factors it deemed appropriate. 18 U.S.C.A. §§ 3663(d), 3664(a).

10. Criminal Law — 1208.4(2)

District court was not required to consider defendant's relative culpability in bank fraud scheme in determining amount of restitution under Victim and Witness Protection Act. 18 U.S.C.A. §§ 3663, 3664.

11. Criminal Law — 1208.4(2)

The $7.5 million award of restitution to bank fraud victim's insurer was not excessive, inasmuch as district court expressly found that defendant received net benefit

in excess of $7 million on the fraudulent sale. 18 U.S.C.A. §§ 1344, 3663, 3664.

12. Criminal Law — 1208.4(2)

Rule of abatement, stating that defendant's death pending appeal of criminal conviction abates all proceedings in the prosecution from its inception, was inapplicable to situation in which any unpaid restitution or fine was to be paid after defendant's death, and defendant did not die pending resolution of his appeal.

13. Criminal Law — 1042

Defendant's failure to raise at trial issue of whether statute providing that obligation to pay a fine ceased upon defendant's death rendered invalid district court's order that any unpaid restitution under Victim and Witness Protection Act be paid upon defendant's death, precluded appellate review. 18 U.S.C. (1982 Ed.) § 3565(h); 18 U.S.C.A. §§ 3663, 3664.

Howard L. Weitzman and Steve Cochran, Wyman, Bautzer, Christensen, Kuchel & Silbert, Los Angeles, Cal., for defendant-appellant.

Ross W. Nadel, Asst. U.S. Atty., San Francisco, Cal., for plaintiff-appellee.

David T. DiBiase, Michael S. Robinson, Anderson, McPharlin & Conners, Los Angeles, Cal., for the amicus curiae, Continental Ins. Co.

Appeal from the United States District Court for the Northern District of California.

Before WALLACE, ALARCON and HALL, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Appellant Ronald V. Cloud appeals from his conviction following a jury trial on charges of aiding and abetting bank fraud, in violation of 18 U.S.C. §§ 2 and 1344 (1982 & Supp. IV 1986), and conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371 (1982). Cloud also challenges the district court's order, entered pursuant to the Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 3663-3664 (Supp. IV 1986) ("VWPA"), requiring him to pay $7.5 million restitution to the insurance company that compensated the direct victim of the bank fraud at issue in this case. We affirm both appellant's conviction and the district court order of restitution.

I

The charges in this case stem from the January 1985 sale of the Cal-Neva Lodge, a hotel and casino complex located in the Lake Tahoe area near the California-Nevada border, by Ronald Cloud to Jon R. Perroton and Cobalt Capitol Corporation, a business association controlled by Perroton.[1]

Viewed in the light most favorable to the government, the evidence adduced at trial is as follows. Appellant Ronald Cloud is a sophisticated, 68-year old entrepreneur who has been in business for over forty years. He currently owns companies in the business of plumbing, irri-

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[1]On June 21, 1985, Jon Perroton was sentenced to twenty years in prison after he pleaded guilty to three counts of bank larceny, interstate transportation of moneys taken by fraud, and bank fraud, in violation of 18 U.S.C. §§ 2113(b), 2314, and 1344 (1982 & Supp. IV 1986), respectively. Perroton was prosecuted in the district court for the Northern District of California in case CR-85-0130-SC. Only the bank fraud count arose out of his purchase of the Cal-Neva Lodge. Perroton was also ordered to pay restitution in the amount of $10 million, or a sum to be determined by the probation office.

gation, electric appliances, and grape cultivation. Cloud is experienced in the purchase and sale of real property and has extensive real estate holdings, valued at the time of trial at over $65 million. Appellant also has experience in the fields of banking and finance, having been the founder and chairman of Continental National Bank of Fresno.

In July of 1980, Cloud (along with his wife, Jessman Cloud)[2] purchased the Cal-Neva Lodge for $10 million from Tracinda Corporation. To finance this purchase, Cloud assumed a $4.3 million loan with First Interstate Bank and Tracinda carried another $4.8 million in the form of a second mortgage. Cloud's equity in the Lodge at the time of purchase appears to have been approximately $1.9 million. After three years of mounting operating losses, Cloud closed the Lodge and actively began seeking a new buyer in October of 1983.

Cloud's first contacts with Jon Perroton took place over a year later in December of 1984. At that time the two men met and orally agreed that Cloud would transfer the Cal-Neva Lodge to Perroton for $18 million. Cloud refused to sign any documents with respect to the sale at that stage of their dealings.

On January 2, 1985, Perroton first met with an officer of Hibernia Bank, a vice president for corporate lending named Louis Chou, to discuss a possible loan transaction to finance his purchase of the Cal-Neva Lodge. It is undisputed that Perroton made multiple false representations during the financing negotiations and presented falsified documents, including a forged sales agreement,

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[2]Although she was nominally a party to the transactions by which her husband purchased and resold the Cal-Neva Lodge, Jessman Cloud was not charged in connection with the bank fraud at issue in this case.

in order to obtain the $20 million loan that Hibernia approved on January 9, 1985. In particular, Perroton told Chou that the sale price for the Lodge was to be $27.5 million and that $7.5 million had already been paid to the Clouds outside of escrow. Perroton also falsely asserted that Sheraton Hotels would lease and operate the Cal-Neva, and would guarantee any loan Hibernia made to finance the acquisition of the Lodge.

The Cal-Neva transaction proceeded swiftly toward closing. An escrow was opened with Transamerica Title Company on January 8, 1985, by an escrow officer named Mickey Eakin. At that time, Perroton misrepresented the essential terms of the sale to Eakin, just as he had to Hibernia. Cloud met with Perroton again for approximately half an hour on January 9, 1985, at which time they agreed to adjust the sale price downward to $17,030,000. On January 11, 1985, Hibernia prepared cashier's checks totalling $20 million for deposit in escrow to be held uncashed by Eakin until the close of escrow. Although Hibernia issued these checks on January 14, 1985, the funds continued to be the bank's property until the close of escrow.

According to Eakin, Cloud spoke with her three or four times over the telephone prior to closing to inquire about the progress of the transaction and the projected closing date. Cloud met Eakin in person for the first time on January 15, 1985. On that date Perroton and his partner, Gene Cochran, drove Cloud — along with his son Steve Cloud, and attorney, James Samarco — to the San Francisco offices of Transamerica Title from the airport into which the Cloud party had flown from Fresno in Cloud's private plane. The purpose of the January 15 meeting was to sign mutual escrow instructions on the Cal-Neva Lodge sale.

Eakin testified that the five men met that day in a conference room at Transamerica, outside of her hearing, to discuss the escrow instructions that she had presented. The only evidence of what happened in the conference room came from Ronald and Steve Cloud and James Samarco. Their testimony revealed that Cloud reviewed the escrow instructions, and noticed that the sale price and down payment figures were inaccurately stated at $27.5 million and $7.5 million, respectively. Cloud also noticed that the Hibernia loan to Perroton was for $20 million, almost $3 million above what he knew to be the true sale price.

The Clouds and Samarco were clearly concerned about the false figures that appeared in the escrow instructions, especially about the tax consequences of the inflated sale price. Without explanation, Samarco asked Eakin to make certain additions to the escrow instructions, including the following language: "Seller to *net* the sum of $17,030,000 plus or minus the proration of taxes and bonds and less the first and second trust deeds." (Emphasis added). As thus amended, the escrow instructions continued to reflect a sale price of $27.5 million and a down payment of $7.5 million, figures that Perroton insisted were "for [his] purposes only."

Cloud signed the amended escrow instructions and the grant deeds to the property, and took both sets of documents home to Fresno so that his wife could sign them. Cloud returned the signed escrow instructions to Transamerica Title three days later, on January 18, 1985. Hibernia was informed on January 22, 1985 that the instructions had been signed.

The Cal-Neva Lodge escrow closed on January 23, 1985, at a meeting at Transamerica Title at which Cloud, Samarco, Perroton, and Cochran were present. Eakin

disbursed the $20 million loan proceeds after receiving authorization from Hibernia. Eakin also prepared a settlement statement for the transaction containing the same false $27.5 million sale price and $7.5 million "cash outside of escrow" figures that had been supplied by the parties. Cloud reviewed the settlement statement at the closing but did not discuss its contents. Finally, Eakin issued checks to Cloud personally for $10,067,137, and to Cloud's mortgagees for $6,971,803. Taken together these checks totalled $17,038,940 — roughly the amount that Cloud's amendments to the escrow instructions indicated he was to "net" from the sales proceeds.

Hibernia claims that its losses on the Cal-Neva Lodge loan exceeded $24.5 million. The bank has recovered a substantial portion of this asserted loss from, among others, its insurer, Continental Insurance Company. Pursuant to a settlement agreement executed on July 19, 1985, Continental paid $7.5 million to resolve Hibernia's claim of loss under the terms of a "banker's blanket bond." Hibernia also recovered $1.5 million from Cloud upon a settlement agreement executed on June 18, 1987.[3]

II

Cloud argues that the foregoing evidence is insufficient to support his convictions for aiding and abetting bank fraud and for conspiracy. There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found each of the essential elements of the

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[3]Hibernia acquired the Cal-Neva Lodge and sold it for $10 million; the bank also recovered $2.2 million from Perroton, and $2.6 million from the law firm that prepared its escrow instructions for the Cal-Neva transactions. To date, then, it appears that Hibernia has recovered $23.8 million of its losses.

crime beyond a reasonable doubt. *United States v. Penagos,* 823 F.2d 346, 347 (9th Cir.1987); *United States v. Pemberton,* 853 F.2d 730, 733 (9th Cir.1988).

A

[1] In order to obtain a conviction for bank fraud in violation of 18 U.S.C. § 1344,[4] the government must prove beyond a reasonable doubt that the defendant knowingly (1) engaged in a scheme to defraud a federally chartered or insured financial institution, or (2) participated in a scheme to obtain money under custody or control of a federally chartered or insured financial institution by means of material, false statements or representations. *See United States v. Goldblatt,* 813 F.2d 619, 624 (3d Cir.1987). For purposes of the bank fraud statute, the terms "scheme" and "artifice" are defined to include "any plan, pattern or cause [sic] of action, including false and fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived." *Id.* It is sufficient to prove that there was a fraudulent scheme in which the defendant participated; it is not determinative that a defendant was not on hand at the "launching" of the scheme if he "came aboard" later. *See United States v. Toney,* 598 F.2d 1349, 1356 (5th Cir.1979), *cert. denied,* 444 U.S. 1033, 100 S.Ct. 706, 62 L.Ed.2d 670 (1980) (mail fraud).

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[4]Section 1344(a) defines bank fraud as the knowing execution or attempted execution of "a scheme or artifice — (1) to defraud a federally chartered or insured financial institution; or (2) to obtain any of the moneys . . . owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises. . . ." 18 U.S.C. § 1344(a) (Supp. IV 1986).

Conviction as an aider and abettor requires proof beyond a reasonable doubt that the defendant willingly associated himself with a criminal venture and participated therein as something he wished to bring about. *United States v. Zemek,* 634 F.2d 1159, 1174 (9th Cir.1980), *cert. denied,* 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341 (1981). Aiding and abetting means to assist the perpetrator of a crime. *United States v. Reese,* 775 F.2d 1066, 1072 (9th Cir.1985); *United States v. Barnett,* 667 F.2d 835, 841 (9th Cir.1982). An abettor's criminal intent may be inferred from the attendant facts and circumstances and need not be established by direct evidence. *Reese,* 775 F.2d at 1072; *see also Zemek,* 634 F.2d at 1180.

The evidence in this case established that sometime in December 1984 or early January 1985, Jon Perroton "launched" a fraudulent scheme to obtain money from Hibernia Bank by means of false representations. It is uncontroverted that Perroton falsely stated the sale price and down payment for the Cal-Neva Lodge, and presented a forged sales agreement to the bank, in order to obtain funds with which to complete the Cal-Neva transaction with Cloud.

[2] The issue before this court, however, is whether a rational trier of fact could conclude on the basis of all the evidence that Cloud at some point knowingly "came aboard" and participated in Perroton's bank fraud scheme. We conclude that a reasonable jury could have found that Cloud "came aboard" on January 15, 1985, at the meeting to sign the escrow instructions, if not before.

There is no question Cloud knew that the sale price was not $27.5 million, that he had not received $7.5 million outside of escrow, and that on their face the escrow instructions (as well as the settlement statement later derived from them) reflected these false figures. There is

likewise no doubt that Cloud, who was a sophisticated businessman with extensive experience both in real estate transactions and in banking, knew that the escrow would not have closed and that the Hibernia funds would not have been disbursed if he had not signed the escrow instructions.

[3] Cloud's primary contention regarding the sufficiency of the evidence to support his bank fraud conviction, however, is that the amendments upon which his attorney insisted served to correct or clarify any possible false representations in the escrow instructions.[5] He argues, in effect, that no reasonable jury could conclude beyond a reasonable doubt that the escrow instructions he executed were false. We disagree. Far from correcting

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[5]In an argument that he seems to have abandoned in his reply brief, Cloud mistakenly relies on *United States v. Bales*, 813 F.2d 1289 (4th Cir. 1987), for the proposition that the government must prove he knowingly made false representations directly to a bank. The bank fraud statute itself contains no such requirement. *See* 18 U.S.C. § 1344. A careful reading of its opinion, moreover, indicates that the *Bales* court imposed no such requirement. *Id.* 813 F.2d at 1293 n. 2 (conviction under 18 U.S.C. § 1014 requires proof that defendant made a false statement to a bank; conviction under 18 U.S.C. § 1344 requires proof that the defendant knowingly executed or attempted to execute a scheme or artifice to obtain money or property owned by or under the custody or control of a federally chartered or insured bank, by means of false pretenses, representations or promises).

Even assuming the government must prove that false representations were made to a bank for purposes of section 1344, there was sufficient evidence to support Cloud's conviction for aiding and abetting bank fraud. As an aider and abettor, Cloud is liable for Perroton's false representations to the bank. As noted *infra*, moreover, Cloud provided confirmation of the false statements in the escrow instructions to Eakin, an escrow officer who was acting in part as an agent for the bank, in full awareness that she would have stopped the transaction from closing if he had not done so.

any possible misrepresentation as to the sale price, the modification indicating that Cloud was to "net" $17 million reasonably could be construed as *confirming* that the "gross" sale price actually was the higher $27.5 million figure. The jury apparently credited testimony by Eakin that she now interprets the escrow instructions, including the modifications suggested by Samarco, as having falsely stated the sale price.

Cloud does not even attempt to argue, moreover, that the changes his attorney requested did anything to "correct" the falsely-stated figure for cash he purportedly received outside of escrow. The government was not required to prove every allegation of fraud; proof of this one material misrepresentation might have been sufficient to support Cloud's conviction. *See United States v. Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979).

[4] We are persuaded that, viewed in a light most favorable to the government, there was sufficient evidence upon which a rational jury could conclude that Cloud affirmatively assisted in the execution of Perroton's fraudulent scheme to obtain the Hibernia funds when he signed the mutual escrow instructions knowing that they contained materially false representations.[6]

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[6]Cloud also appears to argue that: (1) even if the escrow instructions falsely stated the sales price and down payment figures, these representations were not made with the intent to deceive the bank; and (2) the bank did not rely on any material misrepresentations in the escrow instructions that were attributable to him. We reject both arguments.

To act with the "intent to defraud" means to act willfully, and with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself. *See United States v. Peden*, 556 F.2d 278 (5th

B

Cloud also contends that there was insufficient evidence to support his conspiracy conviction. The elements of conspiracy are: (1) an agreement to accomplish an illegal objective, (2) coupled with one or more acts in furtherance of the illegal purpose, and (3) the requisite intent necessary to commit the underlying substantive offense. *Pemberton,* 853 F.2d at 733; *United States v.*

Cir.) *cert. denied,* 434 U.S. 871, 98 S.Ct. 216, 54 L.Ed.2d 150 (1977); *see also* E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 16.05 (3d ed. 1977). It is a well-established principle that fraudulent intent may be established by circumstantial evidence and inferences drawn from all the evidence. *See Bales,* 813 F.2d at 1294 (citing *Mitchell v. Union Pacific Railroad Co.,* 188 F.Supp. 869, 872 (S.D.Cal. 1960)). There was evidence before it from which the jury could infer that Cloud made a calculated decision to sign the instructions in order to obtain his share of the loan proceeds, knowing that the bank could be deceived by materially false statements that appeared on the face of the instructions. For example, the jury heard evidence that Cloud decided to sell the Cal-Neva Lodge after three years of mounting operating losses, and that five years after he purchased the Lodge he sold the losing business at a before-tax profit of over $7 million.

The fact of Hibernia's reliance on false representations made by Cloud, likewise, can hardly be doubted on the facts of this case. The falsely-stated sales price and down payment were the same figures upon which Hibernia officials had relied in approving the loan to Perroton. Both Chou and Eakin testified that the escrow never would have closed, and that the Hibernia funds would not have been disbursed, if Cloud had objected to the misstated information or declined to sign the escrow instructions. At a minimum it appears that Eakin, who was acting in part as an agent of Hibernia, relied on Cloud's apparent confirmation of the false figures. A rational trier of fact could also have concluded, on the basis of Chou's and Eakin's testimony and evidence that Hibernia authorized disbursement of the loan proceeds only after Chou was notified that the escrow instructions had been signed, that Hibernia itself relied on misrepresentations attributable to Cloud.

Indelicato, 800 F.2d 1482, 1483 (9th Cir. 1986). The agreement need not be explicit; it may be inferred from the defendant's acts pursuant to a fraudulent scheme or from other circumstantial evidence. *United States v. Thomas,* 586 F.2d 123, 132 (9th Cir. 1978); *United States v. Oropeza,* 564 F.2d 316, 321 (9th Cir. 1977), *cert. denied,* 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 788 (1978). An inference of the existence of a conspiratorial agreement may also be drawn "if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *United States v. Monroe,* 552 F.2d 860, 862-63 (9th Cir.), *cert. denied,* 431 U.S. 972, 97 S.Ct. 2936, 53 L.Ed.2d 1069 (1977) (quoting *United States v. Camacho,* 528 F.2d 464, 469 (9th Cir.) (citations omitted), *cert. denied,* 425 U.S. 995, 96 S.Ct. 2208, 48 L.Ed.2d 819 (1976)).

[5] A rational jury could conclude beyond a reasonable doubt from the evidence in this case that Cloud and Perroton agreed on January 15, 1985, to engage in a bank fraud scheme. Specifically, the jury reasonably could have inferred that an "agreement" was reached during the meeting at which Cloud and Perroton, along with their associates, discussed the discrepancy between the true sale price and downpayment figures and those appearing on the escrow instructions presented by Eakin. Emerging to sign the escrow instructions after resolving an admitted dispute over the accuracy of those figures is conduct from which it can be inferred that Cloud and Perroton came to a "meeting of the minds" to go forward with the Cal-Neva deal using falsified documents to memorialize the transaction.

As for the other conspiracy elements, the execution of mutual escrow instructions containing materially false representations was compelling evidence of an overt act

in furtherance of the illegal objective. In light of our holding that Cloud was properly convicted of bank fraud, it is also clear that the government has established the requisite intent element for conspiracy to commit bank fraud. We conclude that there was sufficient evidence to support Cloud's conviction for conspiracy to commit bank fraud.

III

Cloud raises several challenges to the district court's order under which he is required to pay a $500,000 fine and $7.5 million in restitution to Continental Insurance Company. First, he argues that the district court was not authorized under the Victim and Witness Protection Act to order restitution in this case because an agreement he entered into with Hibernia Bank, and another contract executed by Hibernia and Continental, fully settled all the victims' claims against him. Second, Cloud contends that the district court abused its discretion by ordering restitution, without making explicit findings of fact, in an amount that was excessive in light of his relative culpability and his net profit on the Cal-Neva Lodge transaction. Finally, Cloud contends that the restitution order and fine were illegal insofar as the district court ordered that the remaining unpaid balance of either penalty will become immediately due and payable upon his death. We will consider each of Cloud's arguments in turn.

A

We have recently held that an insurance company is a proper beneficiary of VWPA restitution order, under 18 U.S.C. § 3663(e)(1) (formerly 18 U.S.C. § 3579(e)(1)), where the insurer has compensated the direct victim of a criminal offense. *United States v. Youpee,* 836 F.2d 1181,

1184 (9th Cir.1988). Whether a district court may order VWPA restitution in favor of an insurance company where settlement agreements have been executed between the defendant and his direct victim, and between the direct victim and its insurer, however, is a related question of law which we will review de novo. *See United States v. Spinney,* 795 F.2d 1410, 1416 (9th Cir.1986); *see also Youpee,* 836 F.2d at 1183 (legality of sentence is reviewable de novo).

Prior to sentencing, Cloud entered into an "AGREEMENT REGARDING SETTLEMENT, RESTITUTION AND MUTUAL RELEASE" by which he agreed to pay Hibernia a total of $1.5 million to settle all its remaining claims against him. Pursuant to a "SETTLEMENT AGREEMENT AND MUTUAL RELEASE" executed with Hibernia, Continental waived *"all subrogation claims and rights* which may arise by virtue of its payment to Hibernia [of $7.5 million] pursuant to this Agreement and *all direct rights or causes of action against any party* arising out of or in any way connected with the Hibernia claim." (Emphasis added).

[6] Relying primarily on language in a Fourth Circuit case, *United States v. Bruchey,* 810 F.2d 456 (4th Cir.1987), Cloud argues that the district court had no authority under the VWPA to order him to pay restitution to Continental as a result of these settlement agreements among the parties.[7] Without referring to any

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[7]Cloud also argues, somewhat incredibly, that he was an intended third-party beneficiary of the agreement by which Continental waived its subrogation and direct rights to sue "any party" in connection with the Cal-Neva transaction. A third party qualifies as a beneficiary under a contract if the parties intended to benefit the third party, and the terms of the contract make that intent evident. *See Karo v. San Diego Symphony Orchestra Ass'n,* 762 F.2d 819, 821-22 (9th

statutory provision, legislative history, or case law authority, the *Bruchey* court declared that:

> Where the victim and defendant *voluntarily* execute [a promissory note or the like], the judge can certainly factor that agreement into his sentencing decision. We must observe however, that such a voluntarily executed agreement constitutes *full and immediate restitution* — fully settling the victim's claim against the defendant. The district court, once it found that the agreement had been reached, would have no further role to play under the VWPA.

810 F.2d at 460 (emphasis in original). We believe that these statements, which clearly constitute dicta,[8] are ill-advised.

Cir.1985). Under California law, a third-party may enforce a contract made expressly for her benefit at any time before the parties rescind it. Cal.Civ.Code § 1559 (West 1982). If Cloud could establish that he was an intended third-party beneficiary, perhaps he could assert the waiver provision as a defense to a civil action commenced by Continental. It does not follow, however, that he can assert any contractual rights he might have to defeat the jurisdiction of a federal court to order restitution pursuant to the VWPA. In any event, we need not resolve the parties' dispute about Cloud's third-party beneficiary claim because he failed to raise it in the district court in the first instance. *See United States v. Grewal*, 825 F.2d 220, 223 (9th Cir.1987) (citing *United States v. Whitten*, 706 F.2d 1000, 1012 (9th Cir.1983), *cert. denied* 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984)).

[8]The facts in *Bruchey*, briefly stated, were that the district court had compelled the defendant to sign a long-term promissory note payable to the victim as a form of restitution. Because the court failed to make specific findings of fact, and because the term of the restitution order exceeded time limits established by the VWPA, *see* 18 U.S.C. § 3663(i)(2), the Fourth Circuit vacated and remanded. *Bruchey*, 810 F.2d at 458-60. The existence of a promissory note or

[7] A faulty premise underlying Cloud's argument here is that Continental had a pre-existing "right" to receive restitution under the VWPA that it could assert or waive. The Supreme Court has held that criminal restitution is not ordered because victims have an independent legal entitlement to it but, rather, as a means of achieving penal objectives such as deterrence, rehabilitation, or retribution:

> Although restitution does resemble a judgment 'for the benefit of the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.

Kelly v. Robinson, 479 U.S. 36, 52, 107 S.Ct. 353, 362, 93 L.Ed.2d 216 (1986).[9] *Accord United States v. Keith*, 754 F.2d 1388, 1391-92 (9th Cir.), *cert. denied*, 474 U.S. 829, 106 S.Ct. 93, 88 L.Ed.2d 76 (1985). Although the *Kelly* Court was discussing restitution ordered pursuant to a state criminal statute, the Court suggested that its hold-

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other settlement agreement was, therefore, not material to the court's judgment.

[9]The *Kelly* Court went on to endorse the view of the judge who had decided the case before it in the bankruptcy proceedings below:

> "Unlike an obligation which arises out of a contractual, statutory or common law duty, [the restitution] obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose."

Kelly, 479 U.S. at 52, 107 S.Ct. at 362 (quoting *In re Pellegrino*, 42 B.R. 129 (D.Conn.1984)).

ing might apply as well to VWPA restitution. *Kelly,* 479 U.S. at 53 n. 14, 107 S.Ct. at 363 n. 14.

[8] Under the reasoning of *Kelly* neither Hibernia nor Continental had an independently enforceable right to receive restitution under the VWPA. It follows that Continental did not waive either a direct or subrogation right to receive VWPA restitution when it settled Hibernia's claim of loss. We therefore conclude that, despite the existence of settlement agreements among the parties, the district court was authorized by the VWPA to order Cloud to pay restitution to the insurance company in this case.[10]

B

We turn next to Cloud's argument that an excessive amount of restitution was ordered in violation of the VWPA. An order of restitution under the VWPA is part of the sentencing process. *See United States v. Richard,* 738 F.2d 1120, 1122 (10th Cir.1984). A sentence which is within statutory limits is reviewed only for an abuse of discretion. *Youpee,* 836 F.2d at 1182.

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[10]We do not by our holding mean to imply that Continental, or any other recipient of VWPA restitution, may obtain a double recovery for injuries resulting from the relevant criminal offense. The VWPA itself expressly forecloses this possibility. *See* 18 U.S.C. §§ 3663(e)(1) and (2). District courts can factor into their sentencing decisions the existence of settlement agreements between the defendant and any victims of the offense. In fact, when ordering restitution under the VWPA the district court arguably is required by sections 3663(e)(1) and (2) to consider such agreements. The district court in this case was fully apprised of, and clearly considered, the existence and terms of the settlement agreements among the parties.

Under the VWPA, the district court may order restitution to any positively identifiable victim of a fraudulent scheme in a definite amount that is supported by the evidence, limited by the victim's actual losses, and judicially established in a proceeding in which the defendant has the opportunity to refute the amount ordered. *United States v. Pomazi,* 851 F.2d 244, 249-50 (9th Cir.1988). In addition, the victims of the offense should be allowed to participate in the sentencing hearing so that their losses can be accurately determined. *United States v. Weir,* 861 F.2d 542, 546 (9th Cir.1988).

[9] In a section entitled "Procedure for issuing order of restitution," the VWPA specifically requires the district court to "consider" the amount of loss sustained by the victim, the financial resources and earning ability of the defendant, the financial needs of the defendant and her dependents, and other factors it deems appropriate. 18 U.S.C. § 3664(a). The VWPA also provides, however, that the imposition of a restitution order should not "unduly complicate or prolong the sentencing process." 18 U.S.C § 3663(d).[11]

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[11]In a footnote in his opening brief, Cloud argues that the district court was required to make clear findings of fact before entering an order of restitution, and that the failure to do so was an abuse of discretion. This court has recently held that a district court is required to make "factual determinations" under the VWPA and enter a specific order of restitution based on such facts. *United States v. Weir,* 861 F.2d 542, 546 (9th Cir.1988). After citing to a Tenth Circuit case, *United States v. Watchman,* 749 F.2d 616, 618 (10th Cir.1984), the *Weir* court sketched only a bare outline of the factfinding process that is required before imposition of a VWPA restitution order. The object, of course, is to make an order of restitution that is complete and accurate, and one that has a sound basis in fact. *Weir,* 861 F.2d at 546.

It is clear from the record in this case that the district court considered the relevant factors as required by the VWPA. At sentencing, the court commented on Cloud's financial resources and his role and culpability in the fraud. Further, the sentencing court indicated before ordering $7.5 million restitution that it had considered the following materials: the presentence report prepared by the probation office, the evidence presented at trial, letters of recommendation and materials submitted by

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Other courts that have considered this issue have held that the district court is required to make clear and specific findings of fact before entering a restitution order. *See, e.g., Bruchey,* 810 F.2d at 459; *United States v. Palma,* 760 F.2d 475, 480 (3d Cir.1985); and *United States v. Durham,* 755 F.2d 511, 514-15 (6th Cir.1985). These courts presumably envision some sort of formal adversarial presentation of evidence, after which the court can resolve factual disputes and enter findings accordingly.

Prior to *Weir,* however, this court held that neither the VWPA nor Fed.R.Crim.P. 32 requires the district court to hold a full-blown evidentiary hearing on the issue of restitution. *United States v. Keith,* 754 F.2d 1388, 1393 (9th Cir.), *cert. denied,* 474 U.S. 829, 106 S.Ct. 93, 88 L.Ed.2d 76 (1985); *see also United States v. Ruffen,* 780 F.2d 1493 1495 (9th Cir.), *cert denied,* 479 U.S. 963, 107 S.Ct. 462, 93 L.Ed.2d 407 (1986). More recently, we have held that the district court is not required to discuss on the record the factors Congress has listed in section 3664(a). *Grewal,* 825 F.2d at 223.

There is nothing in the text or legislative history of the VWPA to indicate that Congress intended the sentencing hearing to be transformed into a second trial on the issue of restitution. If anything, congressional intent appears to have been quite the contrary. *See, e.g.,* 18 U.S.C. § 3663(d). Accordingly, we decline to read *Weir,* by its uncritical and passing reference to *Watchman,* as having worked any major change in the law of this circuit. The sentencing hearing in this case was adequate, and we are satisfied by the record that the district court was well within its discretion to order $7.5 million restitution to Continental on the basis of the materials submitted and arguments presented by the parties. Formal findings of fact were not required.

Continental, memoranda and other documents submitted by the government and Cloud's attorney, and the arguments of the parties.[12]

[10] Cloud contends, however, that the district court erred by failing to consider his relative culpability for Continental's losses.[13] Some courts have indicated that

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[12]An attorney representing Continental was present at the sentencing hearing but declined the court's invitation to present any argument.

[13]It may well have been that the district court actually did consider Cloud's relative culpability when it ordered him to pay Continental $7.5 million restitution. The parties had supplied the sentencing court with the "Judgment and Probation/Commitment Order" by which Jon Perroton was ordered to pay $10 million restitution. The court also knew, however, that Perroton was incarcerated, that he had a negative net worth, and that Cobalt Capital Corporation was bankrupt.

In addition to Perroton, however, Cloud maintains that the district court should have considered the relative fault of Hibernia Bank, Hibernia's lawyers, and Transamerica Title Company in setting the amount of restitution. The notion that a sentencing court should consider the comparative fault of a crime victim when ordering restitution is a strange one indeed.

A secondary theme in Cloud's "relative culpability" argument is that he was not *directly* responsible for Hibernia's (now Continental's) losses. We note that there appears to be a conflict in this circuit regarding the nexus the government must establish between the defendant's criminal conduct and the victim's losses to support a VWPA restitution order. *Compare Spinney,* 795 F.2d at 1417 (government need not prove that the defendant was *directly* responsible for the loss); with *United States v. Tyler,* 767 F.2d 1350, 1351-52 (9th Cir.1985) (restitution is proper only for losses directly resulting from the defendant's offense). Under either test, we believe Cloud's responsibility was sufficiently direct to warrant the district court in ordering him to restore $7.5 million of the estimated $24.5 Hibernia lost as a result of the bank fraud for which both he and Perroton were convicted.

relative degree of responsibility may be an appropriate factor to consider when imposing restitution obligations. *See e.g., United States v. Anglian,* 784 F.2d 765, 768 (6th Cir.), *cert. denied,* 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986). It is not, however, among those Congress has mandated in section 3664(a) for consideration by the district court. We reject Cloud's argument that the district court abused its discretion by failing to consider his relative culpability.[14]

[11] Cloud also argues that the amount of restitution ordered was excessive because he claims to have "netted" only $2.9 million on the sale of the Cal-Neva Lodge.[15] The monetary benefit Cloud obtained from the fraudulent Cal-Neva transaction is not one of the factors the district court was required to consider under the VWPA. 18 U.S.C. § 3664(a); *see also Anglian,* 784 F.2d at 767. The district court expressly found, however, that Cloud received a net benefit in excess of $7 million on the sale. Based on the information before it (that Cloud purchased the Cal-Neva for $10 million by assuming two mortgages

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[14]We also note our recent holding that joint and several liability for the entire loss may be imposed by the sentencing court, pursuant to an order of restitution, on each of the participants in a fraudulent scheme. *United States v. Van Cauwenberghe,* 827 F.2d 424, 435 (9th Cir.1987) (amended opinion). Subject to the statutory limitation on double recovery, both Cloud and Perroton could have been ordered to restore Continental's entire loss, plus the amount of unrecovered loss suffered by Hibernia. As in *Van Cauwenberghe,* then, it was not an abuse of discretion for the district court to order the lower amount.

[15]Cloud's calculation takes into consideration improvements he made on the property, taxes paid on the sales proceeds, and operating losses of nearly $4 million during his ownership. The district court was fully apprised of Cloud's proposed method for computing his "profits" on the sale, and did not abuse its discretion by choosing a different formula.

and initially investing approximately $1.9 million of his own funds, and paid off both mortgages to clear over $10 million at the closing of the sale five years later to Perroton), the district court clearly did not abuse its discretion in ordering Cloud to pay $7.5 million in restitution to Continental.

C

Cloud's final contention is that the district court's order is illegal to the extent that it directs payment of any unpaid fine and restitution upon his death. Appellant argues that such a provision violates the abatement rule of *United States v. Oberlin,* 718 F.2d 894 (9th Cir.1983). *See also United States v. Patterson,* 819 F.2d 1495, 1511 n. 10 (9th Cir.1987).

Concisely stated, the rule of abatement is that "[d]eath pending appeal of a criminal conviction abates not only the appeal but all proceedings in the prosecution from its inception." *Oberlin,* 718 F.2d at 895-96. In *Oberlin,* we held that a criminal prosecution, including both a conviction upon jury verdict and an order of forfeiture, abated *ab initio* upon the death of a defendant who committed suicide a few hours after his sentencing hearing. *Oberlin,* 718 F.2d at 896. Although the defendant had not filed a timely notice of appeal before his death, the rule of abatement was triggered because Oberlin's death prevented a final resolution of the issue of his guilt or innocence in an appeal which was an "integral part of [our] system for finally adjudicating [his] guilt or innocence." *Id.* (quoting *Griffin v. Illinois,* 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956)).

[12] The rule of abatement is basically one that precludes review of a criminal conviction or sentence or other penal sanction where the accused has died during the

pendency of an appeal of right. Where, as here, the defendant has not died pending resolution of his appeal, the rule of abatement is simply inapplicable.[16]

[13] Cloud also argues that the provision by which the unpaid balance of the restitution payments becomes due and payable upon his death is void under 18 U.S.C. § 3565(h) (1982) (repealed effective November 1, 1987). Before it was repealed, section 3565(h) provided that an "... obligation to pay a fine or penalty ceases upon the death of the defendant...." We need not decide this issue, however, because it does not appear that Cloud presented it to the court below. *United States v. Grewal*, 825 F.2d 220, 223 (9th Cir.1987) (citing *United States v. Whitten*, 706 F.2d 1000, 1012 (9th Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984)).

AFFIRMED.

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[16] Cloud also challenges the district court's order imposing a $500,000 fine on the ground that it violated the rule of abatement. In light of our holding that the abatement rule is inapplicable where a defendant has not died pending appeal, there is no reason to disturb the district court's order imposing the fine.

APPENDIX B

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DARLENE G. BRUCHEY,
Defendant-Appellant

No. 86-5561.

United States Court of Appeals,
Fourth Circuit.

Argued Nov. 14, 1986.
Decided Feb. 5, 1987.

Defendant appealed from order of the United States District Court for the Southern District of West Virginia, Dennis R. Knapp, Senior District Judge, which imposed order of restitution. The Court of Appeals, James Dickson Phillips, Circuit Judge, held that: (1) district courts must make specific findings of fact on those matters relevant to application of Victim and Witness Protection Act; (2) court should have made findings with respect to victim's insurance and defendant's resources, financial needs, and dependents; and (3) it was improper to require defendant to sign long-term promissory note in favor of victim, especially where payments under the note would extend beyond defendant's five years of probation.

Vacated and remanded.

1. Criminal Law — 1147, 1208.2, 1208.4(2)

Trial judges enjoy broad discretion in setting sentences and that applies as well to restitution orders under the Victim and Witness Protection Act and such a criminal restitution order will not be overturned absent abuse of

discretion. Victim and Witness Protection Act of 1982, § 1 et seq., 96 Stat. 1248.

2. Criminal Law — 1208.4(2)

Victim and Witness Protection Act requires district judge to balance victim's interest in compensation against financial resources and circumstances of the defendant while remaining faithful to the usual rehabilitative, deterrent, retributive, and restrictive goals of criminal sentencing. 18 U.S.C.A. § 3580(a).

3. Criminal Law — 1208.4(2)

District courts must make specific findings on matters relevant to application of Victim and Witness Protection Act when ordering restitution. 18 U.S.C.A. § 3580.

4. Criminal Law — 1208.4(2)

District courts should have made specific inquiry into victim's insurance, along with other findings of fact, when imposing restitution under the Victim and Witness Protection Act. 18 U.S.C.A. § 3579(e)(1).

5. Criminal Law — 1208.4(2)

In imposing restitution under Victim and Witness Protection Act, courts should make clear findings of fact with respect to defendant's resources, financial needs, and earning ability, and with respect to defendant's dependents, and those findings should be keyed to the specific type and amount of restitution ordered. 18 U.S.C.A. § 3579(e)(1).

6. Criminal Law — 1208.4(2)

It is inappropriate for burden of restitution imposed upon defendant to fall on innocent dependents of defendant. 18 U.S.C.A. § 3579(e)(1).

7. Criminal Law — 1208.4(2)

It was improper to require defendant, as restitution, to sign long-term promissory note in favor of victim, especially where payments would in all likelihood extend beyond the five years' probation imposed and thus beyond the limits of restitution orders under the Victim and Witness Protection Act. 18 U.S.C.A. § 3579(f)(1).

8. Criminal Law — 1220

If restitutionary order fails to satisfy victim, he can seek civil judgment when criminal court's jurisdiction ends or even while the restitutionary order is in effect.

James McCall Cagle, Charleston, W. Va., on brief, for defendant-appellant.

Larry R. Ellis, Asst. U.S. Atty. (David A. Faber, U.S. Atty., Charleston, W.Va., on brief), for plaintiff-appellee.

Before PHILLIPS and CHAPMAN, Circuit Judges, and ROBERT EARL MAXWELL, Chief United States District Judge for the North District of West Virginia, sitting by designation.

JAMES DICKSON PHILLIPS, Circuit Judge:

This appeal concerns an order of criminal restitution made pursuant to the Victim and Witness Protection Act of 1982. 18 U.S.C. §§ 3579, 3580. We remand for findings of fact omitted from the restitution order and offer some

guidelines on fashioning appropriate orders under the VWPA.

I

In a pre-indictment agreement, defendant Darlene Bruchey pleaded guilty to embezzling $50,000 from Magnet Bank, F.S.B., and to making a false entry in the bank's records by entering an unauthorized withdrawal. 18 U.S.C. §§ 657, 1006. On June 24, 1985, the United States District Court for the Southern District of West Virginia sentenced her to two concurrent five-year terms, the maximum sentence, and ordered a 60-day diagnostic study of the defendant.

After a September 11, 1985, hearing, the court modified the defendant's sentence to five years probation and ordered her to make restitution to Magnet. At this September hearing, the court reviewed the pre-sentence report with the defendant and her counsel, and expressed skepticism about her ability to repay the embezzled money. The defendant insisted, however, that her new husband, who earned approximately $380 per week, could support her and her two children from a former marriage. She insisted that she could pay Magnet all of the money she earned until the money was returned. The order entered by the court after this hearing did not offer any findings of fact to support the restitution order and did not specify the timing, form or amount of the restitution. The court apparently relied on the promise of the defendant to reach some sort of private agreement to repay Magnet.

On September 23, 1985, Magnet's attorney sent a "draft" agreement to the defendant's attorney, informing him that once the agreement was "in form which is mutually acceptable" the defendant should return the

agreement to him. Magnet's attorney also indicated that he would forward a copy of the agreement to Magnet for their suggestions. The draft agreement, in the form of a promissory note, required the defendant to pay $100 per month or 20% of her take-home pay, whichever was greater, until the $50,000 was repaid. When Magnet saw its attorney's draft agreement it demanded certain changes. In particular, it insisted that the appellant pay $100 per month or 75% of her take-home pay, that the agreement be executed under seal (thereby extending the period of enforcement under the law of South Carolina, where the defendant now lives), and that Magnet be notified of any after-acquired property on which Magnet could secure a lien.

Before Magnet had the opportunity to communicate its suggested revisions, the defendant's attorney reduced it to final form, and obtained the signatures of the defendant and a local Magnet bank manager. Magnet, however, repudiated the "agreement," insisting that the bank manager lacked authority to sign the promissory note, and demanded that the defendant agree to its proposed modifications. On March 7, 1986, the district court ordered the defendant to appear to "clarify" the restitution requirement of her sentence. At an April 7, 1986, hearing the court, recognizing that the parties had not and would not agree on mutually acceptable terms for the promissory note, ordered the defendant to sign Magnet's proposed agreement. The defendant objected that the terms were unreasonable. By order dated April 10, 1986, the district court modified its prior order to read:

> Accordingly, it is hereby ORDERED that Special Condition No. 1 of defendant's probation, as set forth in the Judgment and Probation/Commitment Order

dated September 20, 1985, be modified to read as follows:

(1) She make restitution in accordance with 18 U.S.C. § 3579 to Magnet Bank in the amount of Fifty Thousand Dollars ($50,000), as set forth in the plea agreement between the United States and the defendant filed herein on May 1, 1985, and that defendant shall make restitution payments of One Hundred Dollars ($100.00) monthly or 75% of her monthly "take-home" pay, whichever is greater. Further, in order to effectuate the terms of her expressed desire and offer to make full restitution of said sum, the defendant shall execute an agreement with Magnet Bank, under seal, containing the following provisions:

(a) Magnet Bank shall be notified of any assets acquired by defendant and the defendant shall perfect a lien thereon in favor of the Bank; and

(b) It is understood that the execution of the agreement under seal has the effect of increasing the statute of limitations under South Carolina law from seven (7) to twenty-one (21) years.

There is no dispute that the defendant, who has only been partly employed since her sentencing, has remained in compliance with the modified order of April 10, 1986, by paying $100 per month to Magnet. She appeals that final order here.

II

[1] Trial judges traditionally enjoy broad discretion in setting criminal sentences. *Solem v. Helm,* 463 U.S. 277, 290, 103 S.Ct. 3001, 3009, 77 L.Ed.2d 637 (1983). This general principle applies as well to restitution orders

under the Victim and Witness Protection Act of 1982. *United States v. Richard,* 738 F.2d 1120, 1122 (10th Cir.1984). Such a criminal restitution order will not be overturned absent an abuse of discretion. *Herzfeld v. United States District Court,* 699 F.2d 503, 506 (10th Cir.1983); *United States v. Carson,* 669 F.2d 216, 217 (5th Cir.1982); *see also United States v. McMichael,* 699 F.2d 193, 194 (4th Cir.1983) (broad discretion under the restitutionary provision of 18 U.S.C. § 3651).

Despite the basic need for appellate deference to trial court sentencing, however, the sentencing process is not free from close appellate scrutiny. To begin with, appellate courts must carefully examine the *process* by which punishment is imposed even while deferring to the trial judge's ultimate sentencing decision. *United States v. Sparrow,* 673 F.2d 862, 864 (5th Cir.1982). In addition, sentencing statutes like the VWPA themselves impose important substantive and procedural limitations on the trial judge's discretion.

[2] The VWPA implicitly requires the district judge to balance the victim's interest in compensation against the financial resources and circumstances of the defendant — all while remaining faithful to the usual rehabilitative, deterrent, retributive and restrictive goals of criminal sentencing. Section 3580(a) accordingly provides that the judge

> in determining whether to order restitution ... and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

[3] Since Congress has seen fit to require the several determinations of § 3580(a), we are in turn obligated to insure that they are made. Effective appellate review, however, is difficult unless the trial court makes explicit fact findings on these statutory factors. For that reason, we join those courts which have invoked their supervisory power to require district courts to make specific fact findings on those matters relevant to application of the VWPA. *See United States v. Hill,* 798 F.2d 402, 406-07 (10th Cir.1986); *United States v. Palma,* 760 F.2d 475, 480 (3d Cir.1985). Since no fact findings accompanied either the September 20 restitutionary order or the modified order of April 10, we must remand.

[4] A brief review of the necessary factual determinations omitted here will underscore the need for our requirement. First, § 3580(a) requires a calculation of the victim's loss. There was no dispute here that the defendant embezzled $50,000. However, § 3579(e)(1) explicitly provides that the court cannot impose restitution for a loss "for which the victim has received or is to receive compensation," though the court may order restitution to an insurer or third party who has already compensated the victim. The Presentence Report indicates that Magnet is insured with a $25,000 deductible; it also indicates that "the bank has yet to make a claim hoping that the defendant would make restitution." The sentencing hearings reveal no discussion of the insurance policy, and the district court should make a specific inquiry, and offer findings of fact, to insure compliance with § 3579(e)(1). *See United States v. Durham,* 755 F.2d 511, 514-15 (6th Cir.1985).

[5] The trial court should also make clear findings of fact on the defendant's resources, and the financial needs and earning ability of the defendant and the defendant's

dependents. Such findings of fact should be keyed to the specific type and amount of restitution ordered.

[6] The record here, it is true, reveals some discussion at the September and April hearings about the defendant's ability to repay Magnet. No doubt fearing an active five-year sentence, she insisted that she would make full restitution and promised that her new husband could provide her basic needs and those of her two young children from a prior marriage. The district court, however, expressed well-founded skepticism about her ability to make prompt restitution, and never considered whether a long-term repayment obligation might later leave her unable to provide for herself or her children. Without some findings of fact, we cannot be sure that the district court even considered the possibility of future hardship for the defendant and her children. It is particularly inappropriate for the burden of restitution to fall on innocent dependents, and thus concomitantly important that this determination be fully developed. *United States v. Gomer,* 764 F.2d 1221, 1223-24 (7th Cir.1985).

III

[7] The need for fact finding in accordance with § 3580(a) is apparent, and its absence easily remedied. More troubling and difficult, however, are the issues raised by the unusual character of the modified restitutionary order at issue here. By compelling the defendant to sign a long-term promissory note with the victim, the district court opened wide the Pandora's Box of criminal restitution generally, and the VWPA specifically. *See* Project, *Congress Opens a Pandora's Box — the Restitution Provisions of the Victim and Witness Protection Act of 1982,* 52 Fordham L.Rev. 507 (1984). The final order's novel fusion of civil compensatory and criminal restitutio-

nary law may have occurred more accidentally than deliberately; the final order apparently evolved out of ambiguous three-way communications between judge, victim and defendant rather than through a calculated effort at innovation by any one of them. Whatever the genesis of the order, however, we believe that the final order is not contemplated in its present form by the VWPA, and that it creates difficult and unnecessary problems. The victim and defendant never "agreed" on the terms of a promissory note and we conclude that the district court should not compel a defendant to sign such an "agreement." Should the victim and defendant reach and offer to the district court a truly voluntary restitution agreement, it should be treated differently than it was treated here.

The VWPA quite clearly "limits the period within which restitution is due." *United States v. Fountain,* 768 F.2d 790, 803 (7th Cir.1985). The statutory limitations on the period of court-ordered criminal restitution are contained in several interrelated sections of the VWPA. Section 3579(f)(3) indicates that restitution will ordinarily be immediate. Section 3579(f)(1), however, permits the court to order restitution "within a specified period or in specified installments." When a judge orders restitution in installments, the "end of such period or the last such installment shall not be later than" the end of probation, five years after the end of a term of imprisonment, or five years after the date of sentencing, § 3579(f)(2). This limitation on the duration of installment restitution, as the Senate Report on the VWPA indicates, reflects the "practical necessity in limiting both the amount of restitution ordered and the period during which restitution payments are ordered to be made." S.Rep. 532, 97th Cong. 2d Sess. 32, *reprinted in* 1982 U.S.Code Cong. & Ad.News 2515, 2538.

By ordering the defendant to sign a promissory note on which payments would in all likelihood extend beyond her five years of probation, the district court accomplished indirectly what the statute forbids directly. The dangers of such disregard for the statutory requirements are not merely theoretical. "Normal" criminal restitution remains within the equitable power of the judge who orders it; he can modify his order (or at least refuse to revoke probation for failure to comply) if the circumstances of the defendant change. When the court purports to order a particular schedule of payment extending beyond the period of the court's jurisdiction, however, the opportunity for equitable adjustment ceases. Even if the court correctly determined that the defendant here can currently pay 75% of her take-home pay to the victim, it cannot foresee the burden such a note may impose in the future. Should the defendant's husband later lose his job, become disabled or die, the defendant and her two children may not be able to make the payments and still provide their basic needs. The terms for repayment in dispute here were crafted by Magnet, as the government indicated at the April hearing, in part to make an example of the defendant. Such a "penal" objective may properly be pursued by a sentencing judge who takes into consideration all of the complexly interrelated objectives of criminal sentencing, and who can moderate his order if necessary. When such objectives are pursued outside the criminal sentencing process, however, we are concerned about the implications.*

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*This is by no means the only puzzle created by effectively incorporating a promissory note within a judicial order for restitution. The Supreme Court has recently held that because criminal restitution orders serve predominately "penal" objectives, the obligation is not dischargeable in bankruptcy. *Kelly v. Robinson*, ____ U.S. ____, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). For the same reason, a

Our expressions of concern regarding the duration and form of the restitutionary order should not be taken to mean that a promissory note or the like should never be countenanced as "restitution." Where the victim and defendant *voluntarily* execute such a note, the judge can certainly factor that agreement into his sentencing decision. We must observe, however, that such a voluntarily executed agreement constitutes *full and immediate restitution* — fully settling the victim's claim against the defendant. The district court, once it found that the agreement had been reached, would have no further role to play under the VWPA. The victim could simply enforce the civil obligation through the ordinary civil process.

[8] A simple rule that district courts separate as best they can the predominately "penal" elements of criminal restitution by court order and the purely "civil" elements of a private compensation agreement would work no hardship on victims while avoiding some of the problems in the as yet uncharted waters of criminal restitution law. A judge can, though he need not, order an indigent defendant to make full restitution, as the district court's first order apparently did. *See United States v. Atkinson,* 788 F.2d 900, 904 (2d Cir.1986). While the judge cannot revoke probation merely because the defendant cannot

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judge can order restitution in installments that exceed the percentage of take home pay reachable in civil garnishment proceedings. We need not decide here whether an effort by Magnet to enforce this hybrid order beyond the period of the court's jurisdiction would be "penal" or "compensatory." It is enough to observe that if the promissory note could be enforced by Magnet as it stands, the result might be unacceptable hardship to the defendant and dependents and unwise interference with the broad goals of sentencing. If, on the other hand, it could only be enforced as an ordinary, dischargeable civil obligation (or not enforced at all) then Magnet will have gained nothing it could not gain outside the district court's order.

make restitution, *Bearden v. Georgia,* 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), *United States v. Satterfield,* 743 F.2d 827, 842-43 (11th Cir.1984), he can monitor the defendant's efforts and exercise obvious leverage during the period of the court's jurisdiction. If the restitutionary order fails to satisfy the victim, he can seek a civil judgment when the court's jurisdiction ends or even while the restitutionary order is in effect. *See Teachers Insurance and Annuity Association v. Green,* 636 F.Supp. 415 (S.D.N.Y.1986). The prior restitutionary order operates to

> estop the defendant from denying the essential allegations of that offense [on which restitution was predicated] in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with state law, brought by the victim.

Section 3580(e).

Criminal restitution rests with one foot in the world of criminal procedure and sentencing and the other in civil procedure and remedy, though because it is part of the sentencing process it is fundamentally "penal" in nature. *Kelly v. Robinson,* ____ U.S. ____, ____, 107 S.Ct. 353, 362-63, 93 L.Ed.2d 216 (1986). The VWPA, by emphasizing the role of restitution, can be expected to generate substantial litigation as judges attempt to accommodate the two often irreconcilably different systems. Some of the problems can be minimized or avoided altogether, however, if judges order restitution in conformity with the VWPA timetable unless they accept a voluntary agreement which fully and immediately satisfies the victim's claim as executed restitution.

VACATED AND REMANDED

APPENDIX C

IN RE LORRAINE JOHNSON-ALLEN.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE

v.

LORRAINE JOHNSON-ALLEN.

IN RE RUBY STEFFLER a/k/a/ INGRID J. STEFFLER.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE

v.

RUBY STEFFLER a/k/a INGRID J. STEFFLER.

APPEAL OF LORRAINE JOHNSON-ALLEN AND RUBY STEFFLER.

IN RE EDWARD AND DEBORA DAVENPORT.

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE AND COURT OF COMMON PLEAS OF BUCKS COUNTY, AND EDWARD SPARKMAN, TRUSTEE.

APPEAL OF EDWARD AND DEBORA DAVENPORT.

Nos. 88-1610, 88-1635.

United States Court of Appeals, Third Circuit.

Argued Dec. 12, 1988.
Decided March 28, 1989.

Rehearing and Rehearing In Banc Denied April 27, 1989.

Chapter 13 debtors brought adversary proceeding for determination as to dischargeability of criminal restitu-

tion obligation. The United States Bankruptcy Court for the Eastern District of Pennsylvania, Bruce I. Fox, J., 83 B.R. 309, entered judgment holding debt discharge, and appeal was taken. The District Court, Shapiro, J., 89 B.R. 428, reversed, and debtors appealed. In separate proceeding, the Pennsylvania Department of Public Welfare brought action to determine dischargeability of criminal restitution obligations. The United States Bankruptcy Court for the Eastern District of Pennsylvania, David A. Scholl, J., 69 B.R. 461, entered judgment in favor of debtors, and appeal was taken. The District Court, Robert S. Gawthrop, III, J., 88 B.R. 659, reversed, and debtors appealed. Consolidating cases for purpose of appeal, the Court of Appeals, Rosenn, Circuit Judge, held that criminal restitution obligation enforceable by state through revocation of debtor's probation qualified as "debt," which debtor could discharge in Chapter 13 proceeding.

Judgment of district court reversed; cases remanded.

Hutchinson, Circuit Judge, dissented and filed opinion.

1. Bankruptcy — 3766

Question as to dischargeability of Chapter 13 debtors' criminal restitution obligations was not ripe for review, until debtors completed payments under debt adjustment plans. Bankr.Code, 11 U.S.C.A. § 1328(a, b).

2. Bankruptcy — 3718(8)

Criminal restitution obligation enforceable by state through revocation of debtor's probation qualified as "debt," which debtor could discharge in Chapter 13 proceeding. Bankr.Code, 11 U.S.C.A. §§ 101(4, 11), 1328(a).

See publication Words and Phrases for other judicial constructions and definitions.

David A. Searles (argued), Eric L. Frank, Community Legal Services, Inc., Philadelphia, Pa., for appellants.

Mary B. Seiverling (argued), Deputy Atty. Gen., Harrisburg, Pa., for appellee.

Harriet R. Brumberg, Asst. Dist. Atty., Philadelphia County, George C. Yatrone, Dist. Atty., Berks County, District Attorneys' Ass'n of Pennsylvania, Philadelphia, Pa., amicus curiae.

Before GIBBONS, Chief Judge, and HUTCHINSON and ROSENN, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

These consolidated appeals raise an important issue, particularly for governmental agencies engaged in public assistance, of whether criminal restitution imposed as a penalty for welfare fraud constitutes a debt dischargeable under Chapter 13 of the Bankruptcy Code, 11 U.S.C.A. § 1301, *et seq.* (West 1979 & Supp.1988). The bankruptcy court, in two separate opinions, held that restitution obligations constitute dischargeable debts under Chapter 13. Appellees, the Pennsylvania Department of Public Welfare (DPW) and the Court of Common Pleas of Bucks County, Adult Probation and Parole Department, (collectively, the State), appealed, and the United States District Court for the Eastern District of Pennsylvania reversed. Debtors appealed to this court.[1] We reverse the judgments of the district court.

[1]This court has jurisdiction over the appeals by virtue of its authority to review final orders of the district court in accordance with 28 U.S.C. § 158(d).

I.

The facts in these cases are not in material dispute. On September 17, 1985, the Davenports entered guilty pleas to the crime of welfare fraud in Bucks County, Pennsylvania Common Pleas Court. Each was sentenced to one year probation and was ordered to make criminal restitution payments of $208 per month, beginning in December 1986, until a total of $2,072.40 had been remitted. Payments were to be sent to the County Probation Department which, in turn, was to forward them to the DPW.

On May 25, 1987, the Davenports filed a voluntary petition under Chapter 13 of the Bankruptcy Code. The criminal restitution obligation, listed as an unsecured debt payable to the DPW, was to receive treatment equal to other unsecured creditors under the plan. When the Davenports failed to make restitution payments as originally ordered, the Probation Department commenced violation of probation proceedings. The Davenports notified the Probation Department on July 20, 1987, of the pending bankruptcy proceeding, and requested withdrawal of the probation violation charges. When the Probation Department refused to withdraw the charges, the Davenports commenced an adversary action in the bankruptcy court seeking a declaration as to the dischargeability of the criminal restitution obligation.

On October 20, 1987, the bankruptcy court confirmed the Davenports' Chapter 13 plan without objection from any creditor and with the express approval of the standing Chapter 13 trustee. On October 19, 1987, the Probation Department proceeded with a violation of probation hearing in Bucks County. The Common Pleas Court denied the motion to revoke probation, declaring that the restitution order "still stands."

Following trial on the issue of dischargeability, the bankruptcy court held that the restitution obligation was dischargeable under Chapter 13. *In re Davenport,* 83 B.R. 309 (Bankr.E.D.Pa.1988). On appeal, the district court reversed, holding that the restitution obligation was not a debt as defined by the Bankruptcy Code, and that a discharge would violate principles of federalism as enunciated in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Davenport v. Pennsylvania,* 89 B.R. 428 (E.D.Pa.1988). On July 8, 1988, after successfully completing their Chapter 13 plan, the bankruptcy court discharged the Davenports under Chapter 13, 11 U.S.C.A. § 1328(a).

In a separate prosecution, Lorraine Johnson-Allen pleaded guilty in a state court to four counts of welfare fraud on June 18, 1985. The court subsequently sentenced her to probation and ordered restitution of $6,300 which was to be paid in ten dollar monthly installments. Johnson-Allen continued payments until she filed her bankruptcy petition under Chapter 13 on March 14, 1986. Like the Davenports' plan, Johnson-Allen's Chapter 13 plan listed the DPW as an unsecured creditor and provided for payments to be paid to the DPW in amounts equal to all other general unsecured creditors. Johnson-Allen advised the DPW and the Philadelphia County Probation Department of the filing, stating that she believed, on advice of counsel, that the filing stayed collection of the restitution obligation and that the obligation would be discharged upon completion of the plan payments. On advice from the Probation Department that the payments were not stayed, Johnson-Allen resumed payments pending disposition of this proceeding. On February 11, 1987, no objections having been filed, the bankruptcy court confirmed Johnson-Allen's plan. No one appealed from the confirmation of the plan.

In a third prosecution in a state court, Ruby Steffler also pleaded guilty to welfare fraud on January 17, 1984. The court placed her on probation and ordered her to make restitution in the amount of $5,506.64, in payments of twenty dollars per month. Steffler also filed a bankruptcy petition under Chapter 13, listing the DPW as an unsecured creditor and accorded the DPW treatment equal to that of the other unsecured creditors. Shortly after filing, she informed the County Probation Department that she would cease restitution payments. However, upon institution of violation of probation proceedings, Steffler resumed her payments. On May 15, 1987, the bankruptcy court confirmed, without objection, her Chapter 13 plan, and no creditor appealed from the confirmation order.

The bankruptcy court consolidated the Steffler and Johnson-Allen proceedings. The court granted summary judgment for both debtors, holding that the restitution obligations were dischargeable under Chapter 13. *In re Johnson-Allen,* 69 B.R. 461 (Bankr.E.D.Pa.1987). On appeal, the district court reversed, again holding that discharge would interfere with the well-established principles of comity and federalism stated in *Younger. Pennsylvania Dept. of Public Welfare v. Johnson-Allen,* 88 B.R. 659 (E.D.Pa.1988).

II.

[1] The threshold issue in this case is whether the dischargeability issue is ripe for determination. If a debtor completes payments under the Chapter 13 plan, discharge of debts is controlled by 11 U.S.C.A. § 1328(a). As discussed *infra* at Section III B, such discharge would encompass restitution obligations. However, if the debtor fails to complete payments, section 1328(b) controls

which would preclude discharge of the restitution order. *See Kelly v. Robinson,* 479 U.S. 36, 53, 107 S.Ct. 353, 363, 93 L.Ed.2d 216 (1986). The Court of Appeals for the Ninth Circuit recently held under similar facts that the dischargeability issue is not ripe for resolution until the plan has been concluded and it is known which discharge provision will apply. *In re Heincy,* 858 F.2d 548, 550 (9th Cir.1988); *see also In re Carroll,* 61 B.R. 178, 179 (Bankr.D.Ore.1986).

We adopt the reasoning of the Ninth Circuit. Because neither Steffler nor Johnson-Allen has completed the Chapter 13 plan, the issue of dischargeability is not ripe, and we will therefore reverse and remand to the district court with directions to dismiss their appeals without prejudice for lack of an appealable order. However, because the Davenports have completed payments under their Chapter 13 plan and have received a discharge of their debts under 11 U.S.C.A. § 1328(a), the dischargeability issue is ripe for resolution by this court. We therefore turn now to the merits of that issue with respect to the Davenports' claims.

III.

[2] The critical issue before this court — whether the restitution obligation is a dischargeable debt — is comprised of two separate and distinct sub-issues. First, whether the restitution obligation constitutes a debt under the Code? Second, assuming the obligation is a debt, whether that debt is dischargeable under Chapter 13 upon completion of payments under the plan? Because resolution of these issues involves questions of law, our review is plenary.

A.

The Bankruptcy Code defines a "debt" as a "liability on a claim," and further defines a claim as "a right to payment." 11 U.S.C.A. §§ 101(11), 101(4) (West 1979).[2] In determining whether an obligation constitutes a claim within the meaning of the Code, Congress advised that the definition of claim is to be given the

> broadest possible definition . . ., that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

H.Rep. No. 595, 99th Cong., 2d Sess. 309, *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, at 5963, 6266; S.Rep. No. 989, 95th Cong., 2d Sess. 21-22, *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, 5807-08. This advice has been well taken by the courts. *See, e.g., Ohio v. Kovacs,* 469 U.S. 274, 279, 105 S.Ct. 705, 708, 83 L.Ed.2d 649 (1985); *In re Remington Rand Corp.,* 836 F.2d 825, 829 (3d Cir.1988). In addition, Congress intended the concepts of "claim" and "debt" to be coextensive. *See* House Report at 310, *reprinted in* U.S.Code Cong. &

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[2]The Code defines a claim as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C.A. § 101(4).

Admin.News at 6267; Senate Report at 23, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 5809; *see also In re Robinson,* 776 F.2d 30, 36 (2d Cir.1985), *rev'd on other grounds sub nom. Kelly v. Robinson,* 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986); *Kelly,* 479 U.S. at 58, 107 S.Ct. at 365 (Marshall, J., dissenting).

Notwithstanding the overwhelming acceptance of the broad nature of the term "claim," the majority of bankruptcy courts have rejected the contention that restitution obligations are "debts" within the meaning of the Code. *See, e.g., In re Kohr,* 82 B.R. 706, 712 (Bankr.M.D.Pa. 1988); *In re Thompson,* 77 B.R. 646, 648 (Bankr.E.D.Tenn.1987); *In re Oslager,* 46 B.R. 58, 62 (Bankr.M.D.Pa.1985); *In re Pellegrino,* 42 B.R. 129, 132 (Bankr.D.Conn.1984); *In re Johnson,* 32 B.R. 614, 616 (Bankr.D.Colo.1983); *In re Button,* 8 B.R. 692, 694 (Bankr.W.D.N.Y.1981). Without resolving the issue, the Supreme Court recently lent this position some credence when it declared that it had "serious doubts" as to whether Congress intended restitution obligations to constitute debts. *Kelly,* 479 U.S. at 50, 107 S.Ct. at 361.

The conclusions drawn by the foregoing bankruptcy courts rest primarily upon combinations of five different arguments relating both to the definition of debt and to the dischargeability of criminal penalties. Those arguments include: (1) the victim does not personally possess a right to the restitution payment as ordered by the court; (2) a discharge of restitution interferes with state criminal proceedings, violating well-established principles of federalism; (3) Congress revised the Code in 1978 against the background of a judicially created exception for the discharge of criminal penalties; (4) discharge of the restitution obligation would create a "haven for criminals" in contravention of congressional intent; and

(5) restitution is intended primarily to rehabilitate the offender and not to compensate the victim. Although we agree that facially there is considerable merit to these arguments, we are constrained to disagree with the ultimate conclusion that the restitution obligation is not a debt under the Code.

As with any statutory interpretation, we begin with the plain language of the statute. The State properly observes that, under the terms of the Code, the restitution obligation is not considered a "claim" or "debt" unless that obligation creates a right to payment. Under Pennsylvania's restitution statute, where a person is convicted for stealing, converting, or otherwise unlawfully obtaining property, the court is authorized to order restitution in addition to any other punishment properly prescribed for the crime. 18 Pa.C.S.A. § 1106(a)(Purdon 1983). The statute, which specifically defines restitution as "[t]he return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court," limits the amount of restitution to "the return of the actual property or its undisputed dollar amount." 18 Pa.C.S.A. §§ 1106(d), 1106(h). If the victim receives any civil award, that award must be reduced by the amount paid under the criminal judgment. 18 Pa.C.S.A. § 1106(g). However, unlike a civil award, restitution payments are made directly to the probation department, not to the victim, and the Department then forwards those payments to the victim. 18 Pa.C.S.A. § 1106(e). Furthermore, the restitution statute grants the probation department sole authority to institute judicial proceedings for the enforcement of the restitution order. 18 Pa.C.S.A. § 1106(f).

The State contends that the enforcement provision, which denies the victim any authority to enforce the

criminal order, compels the conclusion that the victim has no right to payment of the restitution order and that the order does not, therefore, create a debt. Although, as mentioned, this argument has found favor in many bankruptcy courts, *see supra* at 9, and also in the Superior Court of Pennsylvania where in *Commonwealth v. Mourar,* 349 Pa.Super. 583, 603, 504 A.2d 197, 208 (1986), *vacated and remanded for further proceedings,* 517 Pa. 83, 534 A.2d 1050 (1987), the court held that an order of restitution does not create a debtor-creditor relationship between the offender and victim, we are unable to agree that this rational be applied to the Bankruptcy Code.

As noted, Congress intended the concept of "claim," and, by association, the concept of "debt," to be given the "broadest possible definition." "Where the language of the statute is clear, 'only the most extraordinary showing of contrary intentions' justify altering the plain meaning of a statute." *Malloy v. Eichler,* 860 F.2d 1179, 1183 (3d Cir.1988) (quoting *Garcia v. United States,* 469 U.S. 70, 75, 105 S.Ct. 479, 482, 83 L.Ed.2d 472 (1984)). By focusing solely on the offender-victim relationship, however, both the DPW and the courts above unduly restrict those definitions. Even the Superior Court in *Commonwealth v. Mourar, supra,* recognized that although "the victim cannot enforce the order of restitution . . . he could execute upon a civil judgment." 504 A.2d at 208. The only limitation imposed by the language of the Bankruptcy Code is that the obligation must give rise to a "right to payment." There is no requirement that that right be enforceable by any particular person or entity. Nor does the statute mandate such a restriction.

As the Court of Appeals for the Second Circuit noted under similar facts, the language of section 101(4) and the legislative history of the Code indicate that "Congress

intended 'claim' to encompass any right held by any person or entity to enforce any money obligation of the debtor." To hold otherwise would "produce the anomalous result that no holder of a right to restitution could participate in the bankruptcy proceeding or receive any distributions of the debtor's assets in liquidation." *In re Robinson,* 776 F.2d at 35-36. That court ultimately concluded that "any right to the payment of restitution is a claim within the meaning of the Code; and that if any person or entity has a right to receive a payment of restitution from the bankruptcy debtor, the obligor has a debt within the meaning of the Code." *Id.* at 36; *see also Kelly,* 479 U.S. at 58, 107 S.Ct. at 365 (Marshall, J., dissenting); *In re Heincy,* 78 B.R. 246, 248-49 (Bankr. 9th Cir.1987) (restitution obligation constitutes debt within meaning of Code), *rev'd on other grounds,* 858 F.2d 548 (9th Cir.1988); *In re Cancel,* 85 B.R. 677, 678 (Bankr.N.D.N.Y.1988) (same); *In re Cullens,* 77 B.R. 825, 828 (Bankr.D.Colo.1987) (same); *In re Brown,* 39 B.R. 820, 822 (Bankr.N.D.Tenn.1984) (same).

We find the reasoning of the Court of Appeals in *In re Robinson, supra,* persuasive and conclude that the restitution obligation constitutes a debt so long as any person or entity has a right to enforce that obligation. Here, regardless of whether the victim, the DPW, may enforce the order of restitution, there is no question that the Probation Department may enforce the obligation through the institution of violation of probation proceedings. 18 Pa.C.S.A. § 1106(f). Certainly there can be no greater enforcement mechanism than the threat of revocation of probation and the imposition of incarceration. *See In re Robinson,* 776 F.2d at 38. Moreover, as the court observed in *In re Robinson,* 776 F.2d at 35-36, the interpretation suggested by the State would lead to the incredible result that an order of restitution in a state criminal proceeding

would preclude the victim's participation in the bankruptcy proceeding or recovery of any distribution under the debtor's plan of arrangement. We conclude, therefore, that, because the debtors here have incurred a very real obligation to which the Probation Department holds a right to payment within the meaning of section 101(4) of the Code, that obligation constitutes a "debt" under the Code.

Although the Supreme Court in reviewing the Court of Appeals' decision in *In re Robinson* expressed doubt as to whether the restitution obligation is a debt, that doubt is founded upon factors other than the plain language of the statute. *See Kelly,* 479 U.S. at 43-44, 107 S.Ct. at 357-58. Specifically, the concerns of the Court, which we will address more fully with respect to the issue of dischargeability, are based upon "the history of bankruptcy court deference to criminal judgments" and "the interests of the States in unfettered administration of their criminal justice systems." *Id.* We believe, however, particularly in light of the Court's conclusion in *Kelly,* that neither of these concerns alters the conclusion that a restitution obligation is a debt.

In *Kelly,* the Supreme Court held, without deciding the debt issue, that a restitution obligation is not dischargeable under Chapter 7 because that chapter specifically protects from discharge "any debt"

> to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss.

479 U.S. at 50, 107 S.Ct. at 361 (quoting 11 U.S.C.A. § 523(a)(7)). The Court determined that this provision was plainly intended to codify the judicially created rule

that criminal penalties are not dischargeable. As the Court stated, "Section 523(a)(7) protects traditional criminal fines; it codifies the judicially created exception to discharge for fines." *Id.* at 51, 107 S.Ct. at 362. Finding that restitution focuses primarily on rehabilitation and punishment, rather than upon compensation for the actual loss of the victim, the Court concluded that Congress excepted restitution obligations from discharge under Chapter 7 by virtue of section 523(a)(7).

Addressing the issue left unanswered by the Court, Justice Marshall, in his dissent, further illuminated the Court's analysis of the dischargeability issue, when he stated that it compels the conclusion that restitution is a debt. Noting that only debts are subject to discharge under the Code, Justice Marshall reasoned that if restitution orders and other criminal penalties were not debts, there would be no need to except them from discharge under Chapter 7. *Kelly,* 479 U.S. at 58, 107 S.Ct. at 365. We find this reasoning persuasive and conclude that Congress must have intended that such obligations were debts within the meaning of the Code. *See Kelly,* 479 U.S. at 58, 107 S.Ct. at 365 (Marshall, J., dissenting); *In re Heincy,* 78 B.R. at 248; *In re Cullens,* 77 B.R. at 828.

The Court's analysis in *Kelly* also provides an apt response to the argument that criminal restitution is not a debt when such restitution is ordered primarily to rehabilitate the offender rather than to compensate the victim. As the Court held, section 523(a)(7) excepts from discharge criminal restitution precisely because that penalty is imposed primarily for punitive and rehabilitative purposes, and only incidentally for purposes of compensating the victim. The statutory exception to discharge logically leads to the conclusion not only that criminal restitution orders are debts under the Code but also that such

penalties are debts despite the underlying motivations of punishment and rehabilitation. Therefore, we hold that restitution obligations constitute debts even when the state's primary objectives in imposing such obligations are to rehabilitate and to punish the offender, rather than to compensate the victim.

The conclusion that criminal restitution constitutes a debt under the Code is consistent not only with the statutory scheme, but also comports with Congress' objective of encouraging debtors to select the repayment option available under Chapter 13, rather than to opt for straight liquidation under Chapter 7.[3] House Report at 227, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6077. If restitution obligations were not part of the

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[3]The dissent relies on the dicta in *Kelly* to reach a contrary conclusion because the majority has not referred to any specific legislative history which demonstrates that Congress intended to include criminal restitution orders within the meaning of "debt." The dissent's approach, however, elevates the legislative history of a statute, or its absence thereof, over the plain language of that statute. It is well-established that "[i]f the language is clear and unambiguous, and there is no 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' " *National Freight, Inc. v. Larson,* 760 F.2d 499, 503 (3d Cir.), *cert. denied,* 474 U.S. 902 106 S.Ct. 228, 88 L.Ed.2d 227 (1985) (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)). Here, the broad, inclusive language of the statute is clear. To exclude restitution orders from the definition of "debt" would create an exception that Congress did not intend.

Moreover, as we have noted above, the scheme under the new Bankruptcy Code is plainly consistent with the conclusion that criminal restitution is a debt for purposes of Chapter 13 and carries out the congressional intent of encouraging debtors to opt for arrangements under Chapter 13 rather than liquidation under Chapter 7.

Chapter 13 plan, payments in restitution conceivably could deplete all the debtor's resources before any distribution is made to the other creditors. As a result, creditors would be more reluctant to confirm such a plan, making the Chapter 13 option entirely unavailable to some debtors. Such a result is contrary to Congress' objective of expanding the availability of the Chapter 13 option. Therefore, both the language of the statute and the intent of Congress support the conclusion that the criminal restitution obligation is a debt under the Code.

In response to the conclusion that criminal restitution is a debt, the State also relies on the legislative history of the Code, focusing on Congress' statement that "[t]he bankruptcy laws are not a haven for criminal offenders." Senate Report at 51, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 5837; House Report at 342, *reprinted in* U.S.Code Cong. & Admin.News at 6299. Although many courts have attached significance to this statement as support for the conclusion that restitution obligations are not debts, *see, e.g., In re Pellegrino,* 42 B.R. at 234; *In re Johnson,* 32 B.R. at 616, we find this argument unpersuasive. As an initial matter, we note that Congress intended the comment as an explanation for the "criminal proceedings" exception to section 362 which otherwise automatically stays all actions pending disposition by the bankruptcy court. 11 U.S.C.A. § 362. Nowhere in the discussion of either claim or debt, however, does Congress express a similar intention to restrict those definitions to exclude obligations arising from criminal penalties.

Moreover, the lack of such restrictions respecting the definitions of "claim" or "debt" is not remarkable. As discussed, Congress intended those concepts to be accorded broad and sweeping definitions. The language of the statute reflects that intention, employing inclusive,

rather than exclusive, language. On the other hand, Congress elsewhere restricted application of the Code to exclude obligations arising from criminal penalties. Most notable of these exceptions is the exception to discharge for penalties and fines as provided in section 523, discussed *infra* at Part B. Therefore, because Congress has effectuated its policy of preventing the Code from becoming a "haven for criminals" by adopting appropriately restrictive language for specific provisions of the Code, such as sections 362(b) and 523(a), its silence on this subject with respect to other provisions is equally telling and may not be discounted. *See In re Robinson,* 776 F.2d at 37-38; *In re Heincy,* 78 B.R. at 248. We thus decline to second-guess Congress and refuse to insinuate language into its legislation excepting criminal penalties from the definitions of "claim" or "debt."

Having concluded that restitution obligations are debts within the meaning of the Code, we turn now to the issue of whether such debts are excepted from discharge under Chapter 13.

B.

Upon completion of payments under the repayment plan, Chapter 13 requires the court to discharge all debts provided for in the plan with only two exceptions. Neither of the exceptions, however, pertains to penalties such as criminal restitution.[4] Because the plain language of the chapter does not except from discharge debts for criminal

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[4]Specifically, Chapter 13 provides, in pertinent part:

> As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a

restitution, we conclude that such debts are dischargeable under Chapter 13.

The statutory provisions for the discharge of debts and exceptions thereto under Chapter 7 also support the conclusion that restitution debts are dischargeable under Chapter 13. Unlike Chapter 13, Chapter 7 excepts ten categories of debt from discharge as set forth in section 523(a), including, as discussed, section 523(a)(7) which excepts from discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit. . . ." As the Court determined in *Kelly,* criminal restitution obligations fall within the category of "a fine, penalty, or forfeiture" under section 523(a)(7). Although Congress did incorporate into Chapter 13 one of the ten exceptions under section 523(a), it did not, notably, incorporate the provision relevant here, section 523(a)(7) pertaining to criminal restitution, or any facsimile thereof. *See supra* note 3. Congress' considered decision to adopt only one of the section 523(a) exceptions to discharge for Chapter 13 and its concomitant failure to adopt the criminal penalties provision or any similar exception compels the conclusion that such penalties, including criminal restitution, are dischargeable under Chapter 13. *Cf. Kelly,* 479 U.S. at 50, 107 S.Ct. at 361.

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discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt —

(1) provided for under section 1322(a)(5) of this title; or

(2) of the kind specified in section 523(a)(5) of this title.

11 U.S.C.A. § 1328(a) (West 1978).

The two exceptions include debts pertaining to alimony and child support, 11 U.S.C.A. § 523(a)(5), and debts cured after default, 11 U.S.C.A. § 1322(b)(5).

We are mindful of the Court's admonition that "the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief." *Kelly,* 479 U.S. at 49, 107 S.Ct. at 361. However, where Congress has enacted legislation which arguably affects state criminal proceedings, it is not the function of this court to cure any perceived "defects" in that legislation. That authority is granted to Congress alone. Excepting criminal restitut. from discharge, accordingly, is a matter for the Congress, not for the courts. Here, Congress has codified the criminal penalties exception to discharge and has chosen not to apply the exception to Chapter 13 bankruptcy. Regardless of the potential effect on state criminal proceedings, therefore, we are constrained to conclude that the criminal restitution debt is dischargeable under Chapter 13.

We are equally mindful that Congress revised the Code in 1978 against a background of the judicial exception to the discharge of criminal penalties. If Congress had merely amended the Code in 1978 without either adopting or rejecting that exception, we would assume that Congress had acquiesced to its continued application. However, Congress did more than merely legislate against a background of an existing judicial exception; it codified the judicial exception and selectively incorporated it into the amended Code. Although Congress applied the codified exception to discharge under Chapter 7, it opted not to apply it to discharge under Chapter 13. Assuming that Congress desired to limit the application of that long-standing judicial exception, we are aware of no better method for Congress to achieve that goal other than to codify the rule and to apply, or to omit to apply, that rule to the various chapters of the Code, as it has done. Where, as here, Congress has codified a judicial exception and

only incorporated it into specific provisions of a statute, we believe it would be error for this court to inject that exception into the other provisions of the statute. We conclude, therefore, that Congress intended to vary the application of the criminal penalties exception under the Code and did not intend to except such penalties from discharge under Chapter 13.

IV.

Accordingly, the judgment of the district court as to appellants Johnson-Allen and Steffler will be reversed and their cases remanded to the district court with directions to dismiss their appeals without prejudice because their claims were not ripe for resolution. The judgment of the district court with respect to the claims of the Davenports will be reversed and their case remanded to the district court with directions to affirm the order of the bankruptcy court.

Costs in the appeals of Johnson-Allen and Steffler will be taxed to each of them separately. With respect to the Davenports, costs will be taxed to the DPW, the appellee.

HUTCHINSON, Circuit Judge, dissenting.

The majority today holds that criminal restitution orders are "debts" within the meaning of § 101(4) of the Bankruptcy Code and that they are dischargeable under Chapter 13 of the Code. If the only basis for leaving criminal restitution orders undisturbed in bankruptcy were their non-dischargeability, I would agree with the majority that the textual differences between the Chapter 7 and 13 discharge sections would logically make these orders dischargeable in Chapter 13 proceedings. My disagreement with the majority lies in the threshold determination of whether such orders are debts. I am not

persuaded by the majority's analysis on this point in the face of the strong dicta in *Kelly v. Robinson,* 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986), where the Supreme Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)" of the Code. *Id.,* at 50, 107 S.Ct. at 361. I believe that the concerns which prompted the Supreme Court's reservations require a conclusion that restitution obligations imposed as part of criminal sentences are not debts and therefore are not subject to discharge in bankruptcy. Accordingly, I respectfully dissent.[1]

In *Kelly,* the Supreme Court held that § 523(a)(7) of the Code preserves criminal restitution orders from discharge in Chapter 7 proceedings. Although it declined to decide whether such orders are debts under the Code, the *Kelly* Court voiced grave doubts as to whether they are debts before even turning to the construction of § 523(a)(7). In doing so, it strongly suggested that the longstanding judicially created exception to bankruptcy court jurisdiction over criminal restitution orders was not altered by the Bankruptcy Code of 1978. This suggestion is strengthened by the Supreme Court's related observation that while "debt" is broadly drafted, "nothing in the legislative history of these sections compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments." *Id.* at 50 n. 12, 107 S.Ct. at 361 n. 12.

The *Kelly* Court considered two factors in construing § 523(a)(7). They also underlie its comments on the debt issue. It first observed that the Code must be interpreted

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[1]I agree with the Court that only the Davenports' appeal is ripe for disposition. *See* Majority Opinion, *supra* at 423.

"in light of the history of bankruptcy court deference to criminal judgments." *Id.* at 44, 107 S.Ct. at 358. While the most natural construction of the predecessor statute, the Bankruptcy Act of 1898, would have allowed the discharge of criminal penalties, "most courts refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court." *Id.* at 45, 107 S.Ct. at 358. These courts reasoned that the bankruptcy laws affected only civil liabilities and not punishment for the violation of criminal laws, a rationale which was specifically applied to restitution orders imposed as part of criminal sentences. *Id.* at 45-46 & n. 6, 107 S.Ct. at 359 & n. 6. "Thus, Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity." *Id.* at 46, 107 S.Ct. at 359.

The Supreme Court then noted that "interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." *Id.* at 47, 107 S.Ct. at 360. If criminal restitution orders were dischargeable, judgments imposed by state criminal judges would be subject to remission. The prospect of this, the *Kelly* Court reasoned, would impinge on the ability of state court judges to fashion the most appropriate sentences for violations of state criminal laws. *Id.* Observing that Congress would not lightly limit the options available to state court criminal judges, *id.* at 49, 107 S.Ct. at 360-61, the *Kelly* Court concluded that "the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations

that should influence a court considering equitable types of relief." *Id.* at 49, 107 S.Ct. at 361.[2]

It was "[i]n light of the established state of the law — that bankruptcy courts could not discharge criminal judgments" that the Supreme Court said, "we have serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)." *Id.* at 50, 107 S.Ct. at 361. Despite this statement and the long-standing policy against granting bankruptcy courts jurisdiction over criminal restitution orders, the majority finds that Congress must have meant to include them within the definition of "debt." It finds persuasive the dissent in *Kelly* which reasoned that unless such orders are debts there would be no need to except them from discharge under § 523(a)(7). Majority Opinion, *supra* at 427; *Kelly,* 479 U.S. at 58, 107 S.Ct. at 365 (Marshall, J., dissenting).

Just as the majority concedes that most courts have concluded that criminal restitution orders are not "debts" under the Code, Majority Opinion, *supra* at 424, I would, absent *Kelly* and the historical context to which the Supreme Court referred, have to concede logical force to the argument that if they are not debts, there is no need to deny them discharge under § 523(a)(7). The *Kelly* Court, however, was surely aware of this argument. Its grave doubts as to whether criminal penalties are debts in the face of the dissent's reasoning indicates to me that restitution orders imposed as part of criminal sentences are not debts, despite the language of § 523(a)(7).

The Supreme Court has not yet decided whether criminal restitution orders are included in the term "debt." However, it has distinguished them from other obliga-

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[2]The inclusion of restitution orders in the term "debt" would also seem to affect sentencing in United States District Courts.

tions, saying " '[u]nlike an obligation which arises out of a contractual, statutory or common law duty, [a criminal restitution order] is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.' " *Id.* at 52, 107 S.Ct. at 362 (quoting *In re Pellegrino,* 42 B.R. 129, 133 (Conn. 1984)).

The interpretation advocated by the debtors, and accepted by the majority, would intrude on the states' ability to choose the most efficacious means of furthering their penal interests. The interpretation is "in clear conflict with state ... laws of great importance." *United States v. Ron Pair Enterprises, Inc.,* ____ U.S. ____, ____, 109 S.Ct. 1026, 1033, 103 L.Ed.2d 290 (1989). We are not referred to any specfic legislative history which demonstrates that Congress intended to include criminal restitution orders within the meaning of "debt."[3] In the absence of such specific legislative history, I believe the dicta in *Kelly* apply. "If Congress had intended, by

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[3]The majority concludes that the statutory term "debt" is plain and unambiguous. I believe the dicta in *Kelly* imply otherwise. Accordingly, I believe this is "an appropriate case" to consider the absence of legislative history. *See Ron Pair Enterprises, Inc.,* ____ U.S. at ____, 109 S.Ct. at 1032 (where the statutory language is open to interpretation and the proposed interpretation conflicts with important state laws, "a court *must* determine whether Congress has expressed an intent to change the interpretation of a judicially created concept in enacting the Code" (emphasis added)); *cf. id.,* at ____, 109 S.Ct. at 1037 (O'Connor, J., dissenting) (even where language of the Code is not open to interpretation, a court will look to legislative history before concluding that established pre-Code practice has been changed; "[t]he rule ... is that bankruptcy statutes will not be deemed to have changed pre-Code law unless there is some indication that Congress thought that it was effecting such a change.").

§ 523(a)(7) or by any other provision, to discharge state criminal sentences, 'we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.' " *Kelly,* 479 U.S. at 51, 107 S.Ct. at 361-62 (quoting *TVA v. Hill,* 437 U.S. 153, 209, 98 S.Ct. 2279, 2309, 57 L.Ed.2d 117 (1978) (Powell, J., dissenting)); *see also id.* at 47, 107 S.Ct. at 359 ("if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific") (quoting *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection,* 474 U.S. 494, 501, 106 S.Ct. 755, 760, 88 L.Ed.2d 859 (1986)).[4]

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[4]The majority disposes of the impact its decision will have on the states' administration of their criminal justice systems by stating that "where Congress has enacted legislation which *arguably* affects state criminal proceedings, it is not the function of this court to cure any perceived 'defects' in that legislation." Majority Opinion, *supra* at 428 (emphasis added). I think it is beyond argument that today's decision will affect the sentencing discretion of state court judges. *See Kelly,* 479 U.S. at 49, 107 S.Ct. at 360 (prospect of federal remission of judgments in some cases "*would* hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems" (emphasis added)).

The difference between our approaches is also highlighted by the point at which these federalism concerns enter our respective analyses. The majority concludes that criminal restitution orders are debts and only addresses the impact on state criminal proceedings in discussing dischargeability. In contrast, I would consider this impact both in determining whether criminal restitution orders are debts and whether they are dischargeable. The same is true of our respective treatment of the judicial exception to discharge of criminal penalties. Although this exception rests in part on the theory that orders imposed as part of a criminal sentence do not create a debtor-

The judicially created exception "reflect[s] policy considerations of great longevity and importance." *Ron Pair Enterprises, Inc.*, ____ U.S. at ____, 109 S.Ct. at 1032. The majority opinion notes that the literal terms of the Code may support the discharge of criminal judgments, but that was also true under the Bankruptcy Act of 1898. The Supreme Court has indicated to me that the policy considerations and history transcend the logic of a textual analysis. Accordingly, given this history, the complexity of the Code, the opinion of the Supreme Court in *Kelly* and the absence of legislative history evincing Congress's desire to alter pre-Code practice, I cannot conclude that Congress intended such a far reaching intrusion on the states' administration of their criminal justice systems as the majority's result entails.[5]

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creditor relationship, *see id.* at 45-46 & n. 6, 107 S.Ct. at 358-59 & n. 6, the majority addresses it only after concluding that Congress intended to make such orders debts. By considering federalism concerns at each step, my approach is more likely to avoid construing the Code in a manner which impinges on the states' important interest in the unfettered administration of their criminal justice systems.

[5]The majority finds support for its construction of "debt" in the fact that the discharge provisions of Chapter 13 are much broader than those of Chapter 7. It reasons that if criminal restitution orders are not debts, restitution payments may deplete a debtor's resources before distribution to other creditors. This, it is said, would make other creditors less likely to confirm a Chapter 13 plan and would therefore be "contrary to Congress' objective of expanding the availability of the Chapter 13 option." Majority Opinion, *supra* at 427.

Only debts are subject to discharge. The fact that Chapter 13 contains a very broad discharge for obligations which are debts does not necessarily mean that criminal restitution orders should be considered debts. The question is not whether Congress intended to broaden the availability of the Chapter 13 remedy, but how great it intended this expansion to be. I believe the Supreme Court teaches us that if Congress had intended to remove the power to finally define the extent to which a person convicted of crime should make restitu-

I would affirm the order of the district court holding that the Davenports' criminal restitution obligation was not affected by the discharge.

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tion from the criminal courts and place it in the bankruptcy courts — by relegating his criminal restitution orders to the same status as his other obligations — it would have spoken more clearly.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } SS.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

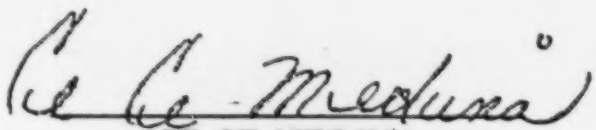
On September 13, 1989, I served the within Petition for a Writ of Certiorari in re: "Ronald V. Cloud v. United States of America" in the United States Supreme Court. October Term 1989 No. 87-1197, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 1989, at Los Angeles, California.



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No. 89-455

In the Supreme Court of the United States

OCTOBER TERM, 1989

RONALD V. CLOUD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTIONS PRESENTED

1. Whether the district court's order, pursuant to the Victim and Witness Protection Act (18 U.S.C. 3663-3664 (Supp. IV 1986)), that petitioner make restitution to the insurer of the bank victimized by petitioner's crimes was precluded by petitioner's settlement agreement with the bank and by the bank's settlement agreement with the insurer.

2. Whether there was sufficient evidence to sustain petitioner's convictions.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 872 F.2d 846.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1989. A petition for rehearing was denied on July 17, 1989. The petition for a writ of certiorari was filed on September 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was con-

victed of aiding and abetting bank fraud (18 U.S.C. 1344 (Supp. IV 1986)), and of conspiring to commit bank fraud (18 U.S.C. 371).[1] He was sentenced to five years' probation and a $500,000 fine and was ordered to pay $7.5 million in restitution to the insurance company that compensated the victim of the fraud. Gov't C.A. Br. 1-2. The court of appeals affirmed. Pet. App. 1a-26a.

1. The evidence at trial is summarized in the opinion of the court of appeals. Pet. App. 5a-9a. It showed that petitioner and co-conspirator Jon R. Perroton submitted false information to the Hibernia Bank to obtain loan proceeds for Perroton's purchase of the Cal-Neva Lodge from petitioner. The submission to Hibernia inflated the purchase price of the lodge and falsely claimed that Perroton had made a down payment on the transaction.

Petitioner, a sophisticated businessman and real estate investor, purchased the Cal-Neva Lodge, a hotel and gambling casino complex in the Lake Tahoe, Nevada, area, in July 1980. Petitioner and his wife paid $10 million for the lodge, most of which was financed through two mortgages. After three years of increasing operating losses, petitioner closed the lodge in October 1983 and began to seek a new buyer. Pet. App. 5a-6a.

In December 1984, petitioner met with Perroton for the first time. The two men orally agreed that Perroton would purchase the lodge for $18 million, but petitioner refused to sign any documents at that time. On January 2, 1985, Perroton went to the Hibernia Bank to secure a loan for the purchase of the lodge. During the course of that meeting and in subsequent discussions, Perroton made a number of false representations and submitted falsified documents, including a forged sales agreement. Among the false state-

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[1] A third count, charging misprision of felony (18 U.S.C. 4), was dismissed by the government prior to trial.

ments were Perroton's representations that the purchase price was $27.5 million, and that Perroton had already paid $7.5 million to petitioner as a down payment. On January 8, the Transamerica Title Company opened an escrow account for the purchase; Perroton made similar misrepresentations to escrow officer Mickey Eakin. On January 9, Hibernia approved a $20 million loan to Perroton. Two days later, Hibernia prepared $20 million in cashier's checks and directed that they be held by Eakin until the close of escrow. Pet. App. 6a-7a.

Petitioner and Perroton, meanwhile, met again briefly on January 9; they agreed to reduce the actual purchase price from $18,000,000 to $17,030,000. Petitioner spoke to escrow officer Eakin several times before the closing on January 15. On that day, petitioner—along with his lawyer and his son—met with Perroton and his partner in a conference room at the Transamerica offices; Eakin was not present during the meeting. In the course of the meeting, according to testimony at trial, petitioner noticed that the sale price was listed as $27.5 million, that a down payment of $7.5 million was listed, and that the loan from Hibernia exceeded the actual purchase price by almost $3 million. Pet. App. 8a. After the meeting, without explanation, petitioner's lawyer asked Eakin to add the following language to the escrow instructions: "Seller to net the sum of $17,030,000 plus or minus the proration of taxes and bonds and less the first and second trust deeds." Despite this addition, the escrow documents continued to state that the selling price was $27.5 million and that Perroton had made a $7.5 million down payment. Petitioner signed the documents, later had his wife sign them, and delivered the signed documents to the title company. Pet. App. 7a-8a.

On January 23, 1985, the purchase went through. After receiving authorization from Hibernia, Eakin disbursed the $20 million loan proceeds and prepared a settlement state-

ment that reflected the claimed $27.5 million purchase price and $7.5 million down payment. Eakin issued two checks to petitioner—one to him personally for more than $10 million and one to his mortgagees for close to $7 million. Pet. App. 8a-9a.

Perroton later defaulted on the loan, resulting in more than $24.5 million in claimed losses to Hibernia. Hibernia recovered almost all of its losses from its insurer, from the sale of the property, and from settlements with petitioner, Perroton, and the law firm that prepared its escrow analysis. Pet. App. 9a & n.3.

2. On appeal, petitioner argued that the evidence was insufficient to sustain his convictions for conspiracy to commit bank fraud and aiding and abetting bank fraud, and that the district court erroneously ordered him to pay $7.5 million in restitution to the insurance company that had paid that amount to Hibernia. The court of appeals rejected both claims.

Regarding the sufficiency of the evidence, the court first determined that the evidence established that petitioner aided and abetted Perroton's fraudulent scheme to obtain money from Hibernia. The court concluded that a reasonable jury could have found that petitioner joined the scheme at least by the conclusion of the January 15 meeting. Pet. App. 11a. At that point, according to the court of appeals, petitioner knew the actual purchase price was not $27.5 million and that he had not been paid $7.5 million outside of escrow. Although the escrow documents reflected those figures, petitioner did not correct the false sales figures. In the court's view, a reasonable jury could have found that petitioner's modification of the escrow documents actually appeared to confirm the accuracy of the sales figures, thereby aiding Perroton's scheme. Pet. App. 11a-13a.

The court reached the same conclusion with respect to petitioner's conspiracy conviction. Pet. App. 14a-16a. The court found that a rational jury could have concluded that at the January 15 meeting, petitioner and Perroton agreed to commit bank fraud. The jury could have reasonably determined that petitioner, Perroton, and their associates "discussed the discrepancy between the true sale price and down-payment figures and those appearing on the escrow instructions," and that petitioner's act of signing the escrow documents after emerging from the meeting demonstrated that petitioner and Perroton "came to a 'meeting of the minds' to go forward with the Cal-Neva deal using falsified documents to memorialize the transaction." Pet. App. 15a.

The court also rejected the challenge to the district court's restitution order. Pet. App. 16a-20a. Petitioner argued that, because he had entered into a $1.5 million settlement with Hibernia, and because Hibernia had entered into a $7.5 million settlement with its insurer (Continental Insurance Company), those agreements precluded any further payments by him to Continental. Petitioner claimed that the insurer, by entering into the settlement agreement, waived its right to restitution under the Victim and Witness Protection Act (VWPA). The court of appeals rejected that argument (*id.* at 16a-20a), holding that the VWPA did not vest a "right" to restitution in the victim, and thus that Continental, the insurer, "did not waive either a direct or subrogation right to receive VWPA restitution when it settled Hibernia's claim of loss." *Id.* at 20a. In so holding, the court of appeals rejected contrary dicta in *United States* v. *Bruchey*, 810 F.2d 456, 460 (4th Cir. 1987), as "ill-advised." Pet. App. 18a.[2]

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[2] The court emphasized that the VWPA does not permit a victim

ARGUMENT

1. Petitioner contends (Pet. 10-19) that his settlement agreement with Hibernia, and its settlement agreement with its insurer, precluded the district court from entering an order of restitution.

Under the VWPA, a district court may not order restitution when the victim has received compensation for that loss, "except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation." 18 U.S.C. 3663(e)(1) (Supp. IV 1986). This provision authorizes awarding restitution to insurance companies that have compensated the direct victims of criminal offenses. *United States* v. *Youpee*, 836 F.2d 1181, 1184 (9th Cir. 1988); *United States* v. *Durham*, 755 F.2d 511, 513 (6th Cir. 1985).

Petitioner maintains that the district court's restitution order was nevertheless precluded by the settlement agreements. He advances two principal reasons. First, he places extensive reliance (Pet. 14-16) on *United States* v. *Bruchey*, 810 F.2d 456 (4th Cir. 1987), and asserts that a conflict between *Bruchey* and the decision in this case warrants review. Second, he maintains (Pet. 10-14, 16-19) that the VWPA should be read to bar restitution after settlement agreements. Neither argument is well founded.

As the court of appeals determined (Pet. App. 18a), the statements in *Bruchey* on which petitioner relies are dicta wholly unnecessary to that court's decision. In *Bruchey*, the defendant and the victim bank, through a local bank of-

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to obtain a double recovery for injuries or losses suffered from an offense. Pet. App. 20a n.10.

The court of appeals also rejected petitioner's claims that the restitution order was excessive (Pet. App. 20a-25a), and that the order should abate in the event of his death (*id.* at 25a-26a). Petitioner does not renew those claims in this Court.

ficial, entered into an agreement, in the form of a promissory note, after the district court had imposed a restitution order. After the bank repudiated the agreement on the ground that the local official did not have authority to enter into it, the district court summoned the defendant, ordered her to sign a modified agreement proposed by the bank, and entered the terms of the modified agreement as an order of the court. 810 F.2d at 457-458. When the defendant challenged that order, the Fourth Circuit held that it was invalid because "[t]he victim and defendant never 'agreed' on the terms of a promissory note and we conclude that the district court should not compel a defendant to sign such an 'agreement.' " *Id.* at 459. The court also held that the district court had committed two separate errors: it failed to make specific factual findings under the VWPA, and it imposed restitution beyond the period permitted by the statute. *Id.* at 458-459. In dictum, the court went on to say that a district court could take into consideration a voluntary agreement between a victim and a defendant, and that "such a voluntarily executed agreement constitutes *full and immediate restitution*—fully settling the victim's claim against the defendant. The district court, once it found that the agreement had been reached, would have no further role to play under the VWPA." *Id.* at 460 (emphasis in original).

As the court below observed (Pet. App. 18a & n.8), the existence of the promissory note was not material to the Fourth Circuit's decision because the other errors of the district court required reversal independent of the terms of the note. In view of the district court's order in that case, moreover, *Bruchey* itself clearly did not involve a voluntary settlement agreement. Hence, the Fourth Circuit's statement about the effect of a voluntary settlement agreement was unnecessary to its decision, and no court, including the Fourth Circuit, has actually enforced that dicta. Accordingly, *Bruchey* provides weak authority for petitioner's con-

tention, and the asserted conflict with the decision here does not warrant review.[3]

Petitioner's statutory argument is equally unsound. The court of appeals correctly concluded that the district court's jurisdiction to enter a restitution order is applicable regardless of a settlement agreement because the purpose of restitution is penal as well as remedial. Pet. App. 19a (citing *Kelly* v. *Robinson*, 479 U.S. 36, 52 & 53 n.14 (1986)). The Ninth Circuit's view of the purpose of the statute accords with that of other courts. See, *e.g.*, *United States* v. *Satterfield*, 743 F.2d 827, 836-837 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985). That a victim may enforce an actual restitution award, after it is ordered by the district court, through civil process (Pet. 16-17; 18 U.S.C. 3663 (h) (Supp. IV 1986)), does not suggest that a settlement agreement divests a court of this penal authority, or bars the court from exercising it. Petitioner's argument requires creating an exception to the district court's explicit authority that the statute itself does not contemplate.[4]

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[3] An additional distinction between *Bruchey* and this case is that petitioner was ordered to pay restitution to the insurer of the victim for the amount that the insurer itself lost as a result of petitioner's crimes, and petitioner raises the agreement between the insurer and the bank as a bar to the district court's restitution jurisdiction.

[4] Petitioner argues (Pet. 17-19) that permitting settlement agreements to bar the exercise of the district court's restitution authority would be good policy. Even if such a policy argument were permitted by the terms of the statute, it would not be persuasive. As the court of appeals held (Pet. App. 20a n.10), settlement agreements should be considered by the district court as one of a number of factors in determining restitution, and the statute itself bars double recovery (18 U.S.C. 3663(e)(1) and (2) (Supp. IV 1986)). Thus, settlement agreements play a significant role in the restitution determination, but they do not have the absolute preclusive effect urged by petitioner.

Contrary to petitioner's suggestion (Pet. 16-17), moreover, the question whether restitution is a "debt" under the Bankruptcy Code (see

2. Petitioner also argues (Pet. 19-23) that there was insufficient evidence to establish that he was a knowing and willful participant in Perroton's scheme to defraud Hibernia Bank. Petitioner does not assert that Perroton did not commit fraud; rather, petitioner argues that he did not participate in that scheme. Both courts below rejected this fact-bound claim, and that determination does not warrant further review.

In this Court, petitioner merely restates the argument that he did not enter into an agreement with Perroton, and that petitioner's amendment of the closing statement establishes his innocence. Contrary to petitioner's contentions, as the court of appeals found (Pet. App. 11a-16a), there was sufficient evidence from which a reasonable jury could have found petitioner guilty beyond a reasonable doubt. Petitioner failed to reveal to the bank or to the closing company the actual purchase price of the lodge and the fact that Perroton had not given him a down payment, and petitioner signed documents containing the false information. Petitioner's reliance on his amendment of the documents to reflect his "net" receipt from the transaction is misplaced. As the court of appeals observed (*id.* at 12a-13a), "[f]ar from correcting any possible misrepresentation as to the sale price, the modification indicating that [petitioner] was to 'net' $17 million reasonably could be construed as *confirming* that the 'gross' sale price actually was the higher $27.5 million figure." Petitioner's modification to the escrow documents, moreover, did nothing to correct the misrepresentation that

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In re Johnson-Allen, 871 F.2d 421 (3d Cir. 1989), cert. granted *sub nom. Pennsylvania* v. *Davenport*, No. 89-156 (Oct. 2, 1989)), does not bear on the preclusive effect of settlement agreements. The effect of settlement awards on the district court's restitution authority does not require an interpretation of the Bankruptcy Code, and the analysis of the Bankruptcy Code, in turn, does not require consideration of the effect of settlement awards on the district court's restitution authority.

he had received a down payment outside of escrow. *Ibid.* Since petitioner signed the modified documents after meeting with Perroton and discussing a discrepancy in the figures, the jury could reasonably have found that petitioner agreed to further Perroton's scheme to defraud the bank, and that he actively aided and abetted that fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 89-455

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

RONALD V. CLOUD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The main question raised by this Petition is whether a court has the authority, under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. Sections 3663 *et seq.*, to impose $7.5 million in restitution for an insurer who executed a settlement agreement expressly waiving any rights to subrogation against Petitioner. The VWPA is intended to compensate victims of crime who otherwise would be forced to initiate litigation against the defendant or forego compensation altogether. The VWPA is inapplicable in this case, however, because a large and well-represented insurance company ("Continental"), acting in its own interest, expressly waived its subroga-

tion rights in return for having to pay only $7.5 million on a $20 million claim. Under these circumstances, Continental is not a "victim" within the meaning of the VWPA.

This issue is ripe for review because of a split of authority among the Circuits. *United States v. Bruchey,* 810 F.2d 456 (4th Cir. 1987) directly dealt with the impact of settlement agreements on a court's authority under the VWPA. The court's ruling, that such agreements render the VWPA inapplicable, is the law of the Fourth Circuit. The Ninth Circuit's opinion in this case directly conflicts with the Fourth Circuit's position on this issue. District courts throughout the country are now faced with a split of authority which this Court should now resolve.

II.

ARGUMENT

A. In View Of Continental's Express Waiver Of Subrogation Rights Against Petitioner, Continental Is Not A "Victim" Withing The Meaning Of The VWPA.

After the primary victim, Hibernia Bank, discovered that it had sustained a loss in connection with the $20 million loan it provided to Mr. Jon Perroton and his company, Hibernia filed a claim of loss in the amount of $20 million against its insurer, Continental. Continental and Hibernia settled Hibernia's claim pursuant to a compromise whereby Continental agreed to pay Hibernia $7.5 million. Continental further agreed to waive all subrogation rights or causes of action it may have had against any party connected with Hibernia's claim of loss, including Petitioner. In turn, Hibernia agreed that it would not pursue its claim of loss for $20 million against Continental. Petitioner and Hibernia subsequently entered into an

agreement whereby $1.5 million was paid to Hibernia by Petitioner to resolve all potential claims. (Pet. 8)

Under these circumstances, judicial intervention by way of an order for restitution is unauthorized and unnecessary. In this case there is no "victim" which a court must protect. Both Continental and Hibernia pursued *and resolved* their legal recourse against Petitioner. A district court should not be allowed to impose a monetary judgment under the VWPA that would be barred by normal civil processes due to the settlements. Because of the settlement agreement and Continental's express waiver of subrogation from Petitioner, Continental should not be considered a "victim."[1]

The government contends that a victim's ability under the VWPA to enforce a restitution award as a civil judgment is not germane to whether a settlement agreement, such as the one in this case, divests a court of authority to impose restitution under the VWPA. The fallacy of this reasoning is that it creates the type of dissymmetry between penal restitution and civil compensatory law that the VWPA is intended to avoid. An insurance company that compensates a victim of a crime has a civil cause of action for subrogation. Accordingly, restitution under the Act can be properly awarded to an insurance company where there are no voluntarily executed settlement agreements waiving subrogation or

[1]An insurance company may be considered a "victim" where it has not waived any subrogation rights. The VWPA does authorize restitution to an insurance company where there are no voluntarily executed settlement agreements between the defendant and any alleged victims resolving all claims of liability. *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985), *United States v. Youpee*, 836 F.2d 1181 (9th Cir. 1988). When an insurance company waives its subrogation rights in consideration for a smaller payment, however, it should not be deemed a "victim" for purposes of the VWPA.

otherwise resolving all claims of liability. *Durham, supra, Youpee, supra.* In this case, however, the district court, in effect, granted a summary judgment on a cause of action (i.e. subrogation) that Continental expressly decided to waive. *A district court should not be able to resurrect or create a right enforceable as a civil judgment that an insurance company has expressly waived.* Continental was well-represented by counsel on this matter, and upon due reflection acted in its own self-interest. *The VWPA was not designed to create obligations or remedies not otherwise obtainable through civil compensatory law. Because the disposition of this issue will enhance judicial economy by obviating the need for litigation when settlements are reached, review by this Court is essential.*

B. There Is A Split Of Authority Between The Ninth And Fourth Circuits Regarding The Effect Of Voluntary Settlement Agreements On A Court's Authority Under The VWPA.

The government contends *Bruchey*'s discussion of voluntary settlements is dicta. (Opposition, 6.) Contrary to the government's analysis, *Bruchey* involved more than just the time period within which restitution under the VWPA must be made. *Bruchey* specifically involved the effect, if any, of voluntary settlement agreements on a court's duties under the VWPA, and the confluence between the provisions of the VWPA and civil compensatory law. The Fourth Circuit's pronouncements regarding the effect of settlements on restitution litigation under the VWPA is the law of that Circuit. *Bruchey* and the Ninth Circuit's conflicting opinion in this case will force lower

courts to struggle with an obvious split of authority. The questions presented by this Petition are thus imminently appropriate for review by this Court.

DATED: November 30, 1989

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

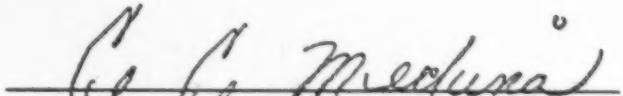
On December 1, 1989, I served the within Reply Brief in re: "Ronald V. Cloud vs. United States of America" in the United States Supreme Court, October Term, 1989, No. 89-455, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 1989, at Los Angeles, California.



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